United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/ affidavit of mailing

75-1118

To be argued by
EDWARD R. KORMAN

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B/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1118

UNITED STATES OF AMERICA,

Appellee,

—against—

FRANK COTRONI and FRANK DASTI,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

Preliminary Statement

Appellants Frank Cotroni and Frank Dasti appeal from a judgment entered on March 24, 1975, in the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*), after a jury trial, convicting them of conspiracy to import cocaine into the United States for the purpose of sale (Count I), and receiving, concealing and facilitating the transportation and concealment of approximately 9 kilograms of cocaine (Count II). The appellant Cotroni was sentenced to concurrent 15 year terms of imprisonment and fined $20,000. The appellant Dasti was also sentenced to concurrent 15 year terms of imprisonment on each count of the indictment; this sentence was in turn to run concurrently with a 20 year sentence arising out of a narcotics conviction in the District Court for the District of New Jersey. Both defendant appellants are presently incarcerated.

Statement of Facts

A. Introduction

1. Theory of the Case

This case involves a chain conspiracy to bring nine kilograms of cocaine into the United States; the conspiracy stretched through three countries and involved at least ten or fifteen individuals, seven of whom were named in the indictment. The supplier of the cocaine was a major Mexican narcotics dealer named Jorge Asaf y Bala; one of his regular drug couriers, Claudio Martinez, transported the cocaine into the United States from Mexico.

The appellant Cotroni, a Canadian citizen, was brought into the conspiracy by a friend, Giuseppe Catania, another narcotics dealer in Mexico who was at that time assisting Asaf y Bala to sell the nine kilograms of cocaine. A major figure in organized crime in Montreal, Cotroni became the first link in the chain sale by agreeing to purchase the cocaine from Catania and Asaf y Bala. The appellant Dasti, an associate of Cotroni and also a Canadian citizen, handled many of the arrangements for Cotroni in connection with the cocaine. It was Dasti, for instance, who contacted an American named Paul Oddo, the next link in the chain, to offer the cocaine for sale. Subsequently, Dasti handled the price negotiations with Oddo and arranged the delivery of the cocaine directly to Oddo.

Paul Oddo, and his associate Anthony Vanacora, in turn, either sold or passed on the cocaine to a James Altamura, another American. Altamura then became the link to the Bynum drug organization. After receiving the cocaine from Oddo, five kilograms were delivered by Altamura to Joseph Cordovano, a confederate of Alvin Lee Bynum, a major New York narcotics trafficker. Cordovano then brought the cocaine directly to Bynum. Involved with Cordovano and Bynum was an undercover operative named George Stewart.

Although the conspiracy involved cocaine, the main interest of the appellants and the other conspirators did not appear to be the cocaine itself; rather, all of the actors from Cotroni through Oddo to Bynum, were interested in developing Catania as a connection to a source of heroin at a time when there was a serious shortage of heroin for the "local market." *See United States* v. *Bynum,* 485 F.2d 490, 494 (C.A. 2, 1973). The cocaine purchases were viewed primarily as a means to that end. This was established by both the direct testimony of participants in the conspiracy as well as by the eavesdropped telephone conversations. Continually, reference was made during these conversations between the conspirators to the "other thing," the heroin, always tied to the cocaine deal. Catania, the potential Mexican connection, indicated after the cocaine had been delivered that the expectations of the conspirators about a source of heroin were realizable: the heroin could be obtained from Europe and transported to the United States along the route the cocaine had taken.

2. The Nature of the Evidence

The case was based on the testimony of participants in the chain conspiracy, numerous visual surveillances conducted by Canadian and American narcotics agents (and related evidence), and summaries or transcripts of wiretapped conversations of the appellants and the other conspirators.

The principal witness for the United States was Giuseppe Catania, who had arranged the sale of the cocaine to Frank Cotroni and Frank Dasti. Catania provided extensive testimony as to the negotiations with Cotroni over the cocaine deal, Dasti's role in the delivery of the cocaine to Oddo, and the subsequent efforts of the appellants to deliver payment for the cocaine, events which took place between December 1970 and September 1971. In 1973, Catania, under indictment in the Eastern District of New York for violation of

the narcotics statutes, specifically, trafficking in heroin, was arrested in Texas by agents of the Drug Enforcement Administration. Subsequently, Catania was allowed to plead guilty to less serious charges in exchange for his cooperation Tr. 47-50.[1]

The other participant in the conspiracy who testified was George Stewart. He provided the details of the Bynum end of the chain sale and testified that the cocaine deal was viewed by the conspirators as a means to obtain heroin. In 1970, charged with violations of the Federal narcotics laws, Stewart agreed to cooperate with the United States; during January of 1971, the period covered by his testimony, Stewart was acting in the capacity of an undercover operative for the Bureau of Narcotics and Dangerous Drugs (predecessor agency of the DEA). Subsequently, he provided testimony in the conviction of Alvin Lee Bynum, a major narcotics dealer (A. 2242-2245). See *United States* v. *Bynum, supra.*

The testimony of Catania and Stewart was corroborated by the visual surveillances and the wiretapped conversations. The surveillances were conducted in Mexico, Canada and the United States by agents of the Royal Canadian Mounted Police (RCMP) and the Bureau of Narcotics and Dangerous Drugs (BNDD). In addition, airline records, hotel records, and other documents provided further corroboration of the direct testimony of Catania and Stewart. Extensive corroboration of the prosecution's witnesses was also provided by summaries and transcripts of thirty-two eavesdropped conversations.

In order to facilitate the jury's understanding of the conversations—the appellants never used the actual words "heroin" or "cocaine" in their telephone conversations, but

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[1] All references are to the Appendix unless otherwise indicated.

instead used other words to convey the intended meaning—the prosecution introduced the testimony of expert witnesses familiar with coded narcotics transactions. Paul Sauve, a member of the Royal Canadian Mounted Police with eighteen years experience in narcotics investigations (experience that included listening to numerous intercepted conversations of Dasti and Cotroni) testified that the word "suits" is commonly used in the narcotics trade to refer to a kilogram of cocaine or heroin (A. 2426). Benjamin Fitzgerald, an employee of the DEA and a veteran of narcotics investigations since 1947, also testified that the words "suits" or "shirts" are used to refer to a unit of heroin or cocaine, generally a kilogram if "kilo traffic" is involved (A. 2454-2456). In addition, there was testimony that the term "rent" is used in narcotics transactions to mean "price per kilo" (A. 2416).

The coded narcotics transactions monitored by the Canadians did not include every conversation relating to the cocaine deal. The Quebec Police Force was unable to place wiretaps at every location in Montreal where Frank Dasti or Frank Cotroni could be reached by telephone (App. 1843-1846). In one case, a wiretap was installed only minutes after Frank Dasti had begun a conversation in a pay telephone booth (App. 1809, 1843-1845). As a result, the prosecution could not fill in every last particular of a complex drug transaction involving ten or more individuals in three different countries. At certain points, reasonable inferences, based on the direct testimony, the visual surveillances and the wiretapped conversations, were necessary to provide the missing details. Although the appellants, attempted to emphasize the few aspects of the prosecutions's case that were proven inferentially, the fact remains that the proof taken as a whole overwhelmingly supports the verdict of the jury; and, of course, appellants do not suggest otherwise.

B. The Conspiracy: December, 1970

Since 1969, Giuseppe Catania, an Italian citizen living in Mexico City, had been associated with a Mexican citizen named Jorge Asaf y Bala in narcotics trafficking. Towards the end of December, 1970, Asaf y Bala asked Catania to find a customer for ten to twelve kilograms of cocaine that Asaf y Bala wished to sell (Tr. 55-60). Wanting to accommodate his partner, Catania approached the appellant Frank Cotroni about the cocaine. Cotroni, a Canadian citizen, under surveillance by American and Mexican narcotics agents, had arrived in Mexico City on December 19, 1970, for a vacation (A. 1666-1668); he had been picked up at the airport in a car registered to Giuseppe Catania (A. 1668-1669). Cotroni was a logical person for Catania to approach about a drug deal. An acquaintance of Catania's since 1966, he was a major figure in organized crime in Montreal (Tr. 518-519) and was known by Catania to be closely associated with a Guido Orsini, a narcotics dealer with whom Catania had had a "close relationship" and past narcotics transactions (Tr. 539-543). In addition, many of Catania's regular customers were either in jail or then involved in their own narcotics transactions.[2] For these reasons, toward the end of December, 1970, Catania sought out Cotroni as a potential customer for Asaf y Bala's cocaine.[3] Cotroni, interested in a deal, told Catania that

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[2] Orsini, for example, was at that time apparently involved in a narcotics transaction in Italy (A. 2430-2431, 2437-2448).

[3] The Appellant's brief states erroneously that Catania did not have any reason to believe that Cotroni had any involvement in narcotics (Brief for Appellant, at 14). The following is an excerpt from the trial testimony of Giuseppe Catania (Tr. 541-42):

> From what I understand, Mr. Orsini [a drug dealer] was associated with Mr. Cotroni in restaurant or night club, I don't know what it was, business.

[Footnote continued on following page]

he would first have to contact a "friend" (Tr. 59). Cotroni then contacted his "friend," the appellant Frank Dasti, an associate who also lived in Montreal (Tr. 69). Although this communication was not overheard (not all of the locations to which a call could be directed in Canada were wiretapped), on December 30, 1970, Frank Dasti was monitored in Canada speaking with a Paul Oddo, an American drug dealer, who was then in New York (A. 1756-1762; Government Exhibit 39, Conversation No. 1). In their telephone conversations, Dasti was already sounding out Oddo on a cocaine deal.

> Dasti: Eh, do you know what I used to give you?
>
> Oddo: Yeah.
>
> Dasti: Could you use the other one? If you understand me.
>
> . . .
>
> Oddo: Oh, I know what you mean. I don't know.
>
> Dasti: Starts with a C.
>
> . . .
>
> Oddo: Ehh, we could eh manage with that.

In effect, Dasti was telling Oddo that the heroin—what "I used to give you"—will be available later, but right now I have some cocaine available, if you understand me.

Oddo was obviously interested, but needed to know more details, such as price and quantity. Dasti assured him that all the necessary information would be provided, but that the terms would be about the same as for the heroin that

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Also, from my understanding of what the situation was Mr. Orsini didn't do anything without the approval of Mr. Cotroni. That is why I approached Mr. Cotroni and mentioned to him whether he could be interested in the cocaine, since there had been a previous transaction between Guido Orsini and Buchtta, from which I received $4000.

had been supplied to Oddo in the past. Moreover, in Mexico City, several days after Cotroni had told Catania he would have to contact a "friend," Cotroni informed Catania that "there would be no problem in the selling of the cocaine" (Tr. 60). Cotroni indicated that his "friend" would still have to be informed of the exact price and quantity; Catania told Cotroni that nine kilograms of cocaine would be available at $11,000 per kilogram (Tr. 60).

Subsequently, Cotroni, on December 31, 1970, flew to Montreal from Mexico to attend the funeral of a brother-in-law (A. 1689-1691). In Montreal, Dasti, waiting for Cotroni to arrive, spoke to Oddo (in New York) on the telephone (A. 1762-1765; Government Exhibit 39, Conversation No. 2). He informed Oddo that "I'll know more today"—*i.e.*, after Cotroni arrived. Oddo was concerned about the price and quantity of the cocaine, particularly the quantity.

> Oddo: But the thing is I gotta find out eh eh, you know, what's what, you know.
>
> • • •
>
> And how, how many K suits [kilograms of cocaine] you gotta.
>
> Dasti: (laughingly) Gotta, I can get a few dozen.
>
> Oddo: Yeah? Oh, man beautiful.

In fact, Oddo was so jubilant about the cocaine that he announced to Dasti that "meanwhile, see, I know already where I got to go, you know"—*i.e.*, Oddo was going to start—or had already started—lining up customers. As subsequent developments would show, Oddo contacted James Altamura, a drug supplier for the Bynum drug ring. *See United States* v. *Bynum*, 485 F.2d 490, 493 (C.A. 2, 1973). Oddo had had previous contact with Altamura. On October 6, 1970, a meeting had taken place in Montreal, observed by Canadian and American narcotics agents, that involved Oddo, Altamura, Anthony Vanacora (an associate of Oddo's) and Frank Dasti (A. 2100-2104).

C. The Consummation of the Conspiracy: January, 1971

January 1

On January 1, 1971, Frank Dasti, in the Victoria Sporting Club, an illicit gambling establishment in Montreal (A. 2370), called Paul Oddo in New York (A. 1766-1771; Government Exhibit 39, Conversation No. 3). After having personally spoken with Cotroni, Dasti was apparently confident that the terms of the cocaine sale would be acceptable to Oddo and told him that: "I mean eh we can make a deal, there's no question about it." Oddo, who had apparently lined up a buyer (James Altamura), announced that he would "tell this guy eh, he's gonna get them suits you know?" Dasti, indicating it would take about ten days before the cocaine could be delivered to Oddo,[4] planned to give Frank Cotroni the "O.K." immediately. At this point, the cocaine deal was shaping up very nicely: Catania would sell to Cotroni and Dasti who, in turn, would sell to Paul Oddo who, in turn would sell or pass on the cocaine to Altamura.

Dasti, having concluded the deal with Oddo, called Frank Cotroni who was still in Montreal, to give him the good news (A. 1772-1779; Government Exhibit 39, Conversation No. 4).

> Dasti: Yeah, I spoke with the guy you know!
>
> Cotroni: Yeah.
>
> Dasti: Yeah and he was very satisfied you know, if hm, if the rent does not go up you know.
>
> Cotroni: Yeah, I understand, yeah.
>
> Dasti: You know, he is very satisfied, and hm, he is ready to rent the place you know.

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[4] Dasti was quite correct; the delivery to Paul Oddo took place ten days later on January 10 (Tr. 75-81).

Cotroni: Yeah?

Dasti: Yeah, anything that eh, that I'll say, he'll do, you understand?

Later that day, Cotroni, assured of a customer for the cocaine, returned to Mexico City, departing at 5:00 p.m. on a Canadian Pacific Airlines Flight (A. 2422-2423).

In Mexico City, Cotroni told Catania that he was ready to proceed with the cocaine transaction; they agreed that, prior to the delivery of the cocaine to Dasti in New York, there would be a meeting in Montreal (Tr. 61). Following this conversation, Catania met with Asaf y Bala to inform him that an arrangement had been reached. At this meeting, Asaf y Bala introduced Catania to the courier, a Claudio Martinez, who had on past occasions carried narcotics for Asaf y Bala. Martinez was instructed that once he had crossed the Mexican border he should proceed to the Ramada Inn near the Dallas Airport (Tr. 62-63).

January 4

On January 4, 1971, while the preparations to transport the cocaine across the border were getting underway, James Altamura, having agreed to purchase nine kilograms from Paul Oddo, was looking for a buyer to whom *he* could sell the cocaine. On January 4, a meeting took place at Pagano's Restaurant in Manhattan, probably arranged by Altamura. Present were Altamura, George Stewart, a drug dealer who was then acting in the capacity of an undercover operative for the Bureau of Narcotics and Dangerous Drugs (the predecesor of the Drug Enforcement Administration), and Joseph Cordovano, a member of the Bynum drug organization.[5] Altamura told

[5] In *United States* v. *Bynum*, *supra* at 493, James Altamura was described as a drug supplier for the Bynum organization, who "'normally operated through Joseph Cordovano."

Stewart and Cordovano that he had a shipment of cocaine coming down from Canada in the near future. Cordovano, hesitant because Altamura had not been entirely reliable in the past, decided to "wait and see" what developed before agreeing to make a purchase of the cocaine (A. 2245-2248).

Four days later, Cordovano, on behalf of Alvin Lee Bynum, had decided to accept Altamura's offer, or at least a part of it. As it turned out, Bynum would eventually purchase five kilograms of cocaine from Altamura. But it was clear to George Stewart that the main interest of Cordovano and Bynum in the cocaine was their expectation that a new source of heroin would be developed: Altamura had promised that, in addition to twenty-four kilograms of cocaine,[6] twenty-four kilograms of heroin would be available before the end of the month (A. 2249-2250).

The final link in the chain sale of cocaine was now in place. Catania, supplied by Asaf y Bala, would sell to Cotroni. Cotroni and Dasti would sell to Paul Oddo (and his associate, Anthony Vanacora). Oddo and Vanacora would pass the cocaine on to Altamura. Altamura would sell a portion of the cocaine to Bynum, with Cordovano acting as the go-between.

January 5

But the cocaine deal was nearly stalled before the delivery had even taken place. On January 5, Oddo and Vanacora (in New York) called Dasti in Montreal. They apparently were not convinced that the cocaine would bring them heroin—they wanted to know more about the heroin,

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[6] Cordovano's mistaken belief that twenty-four kilograms of cocaine were on their way apparently stemmed from Dasti's remark on December 30, 1970, before he knew the details of the transaction, that "I can get a few dozens" (A. 1764).

the "other thing" (A. 1790-1792; Government Exhibit 39, Conversation 7).

> Vanacora: Listen; eh, how's the other thing? Anything on the other thing or we're still talking about that same thing?
>
> Dasti: We're still talking about the same thing Tony, and I explain to you the other thing by the end of the month I should know exactly how I stand with the other one.

Still not satisfied, Oddo and Vanacora called Dasti again later in the evening (A. 1793-1797; Government Exhibit 1, Conversation No. 8). Dasti was getting somewhat exasperated; he did not want to talk on the phone. Instead, he told Vanacora, "if you come in, I'll show you the suits . . . I'll sit down and if the guy is ready . . . He wants to be my partner, he's O.K., if not . . ." In so many words, you guys come up to Montreal and we'll talk; if you are ready to proceed with the cocaine, fine, if not, I'll get someone else.

January 6

On January 6, Dasti, Oddo and Vanacora were observed together in Montreal by agents of the Royal Canadian Mounted Police and the BNDD. Later that evening, after the three men had dined together at a restaurant, Dasti was observed driving the two Americans to the Montreal Airport (A. 1879-1883). Apparently reassured about the heroin and ready to continue with the cocaine deal, Oddo and Vanacora[7] flew back to New York.

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[7] Paul Oddo served as a defendant because of ill health. Anthony Vanacora, pled guilty prior to trial, and was scheduled to testify as a witness for the government, ultimately declined to do so.

January 7-8

On January 7, 1971, Giuseppe Catania traveled to Montreal from Mexico City, having been informed by Asaf y Bala that the courier, Claudio Martinez, had safely crossed the border and was on his way to the Ramada Inn in Dallas with the cocaine (Tr. 63, 65-66). The following day, January 8, 1971, Frank Cotroni was in Montreal for the predelivery meeting with Catania. That evening, in Montreal, Catania was observed by the Royal Canadian Mounted Police at a meeting with Cotroni and Dasti at the Pescatore Restaurant (Tr. 67-70, A. 1888-1891). Over dinner, Dasti and Catania arranged to meet the following Sunday (January 10, 1971) in New York City to complete the delivery of the cocaine; it was agreed that if they did not meet at the scheduled time, 5 p.m., then the time of the appointment would be postponed every two hours, *i.e.*, to 7 p.m., then 9 p.m. and so on.

After the three men finished their dinner, Frank Dasti telephoned his wife, Pinky, from the Pescatore Restaurant (A. 1904-1909; Government Exhibit 39, Conservation No. 9). Dasti told his wife to pack her bags for New York because "I gotta meet some people on Sunday, you know?" According to Dasti, the trip was being paid for by "Frankie" (Frank Cotroni). His wife, saying goodbye, cautioned her husband: "You be careful honey."

January 9

This was the day that Catania and Martinez, the courier, were to meet at the Ramada Inn near the Dallas Airport. Catania left Montreal and flew to New York to make a connection for Dallas, but his Dallas flight was delayed because of bad weather (Government Exhibit 27, Tr. 71-72). Claudio Martinez, driving a Datsun (and carrying nine kilograms of cocaine with him) checked into the Ramada Inn (Government Exhibit 42; A. 1912).

On January 9, 1970, Frank Dasti, under police surveillance, and his wife arrived in New York City from Montreal. After registering at the Hotel Drake (Government Exhibit 41; A. 1911), Dasti entered a vehicle in which Anthony Vanacora (the partner of Paul Oddo) and an unidentified individual were sitting. After 20-25 minutes, Dasti left the car, registered to Vanacora's son, and walked back into the Drake Hotel. A police surveillance, involving seven agents, was in operation around the hotel (A. 1920-1922).

January 10

On January 10, 1971, in the morning, Frank Cotroni received a message from Dasti (A. 2002-2003). Dasti, concerned about the police surveillance and realizing that the game had become more risky, wanted Cotroni to know that "it was very dangerous to do what they have to do." However, the message stated that Dasti would "do what he has to do." Meanwhile, in Dallas, Catania joined Martinez at the Ramada Inn (Tr. 72). Martinez mentioned to Catania that he had been surprised by the color of the cocaine—the drug, usually white, contained brown spots. The two men left the Ramada Inn at 10:00 a.m. and took a plane to New York City (Government Exhibit 42; Tr. 73; A. 1912). They registered at the Hotel Taft in Manhattan at 7:13 in the evening (Tr. 73-74, Government Exhibit 28). Leaving the cocaine in their hotel room, Catania and Martinez walked to the pre-arranged location where Dasti, who had managed to evade the surveillance[8] (A. 1925-1926), was waiting for them (Tr. 75).

To Catania's surprise, however, Dasti had changed the original plan; with heavy police surveillance he wanted to

[8] Dasti was lost at two points during the day; at approximately 4 p.m. (just before the first scheduled meeting) and then sometime after 6 p.m. (i.e., prior to the second, postponed meeting, which did take place) (A. 1925-1927).

avoid any direct contact with the cocaine. Shortly the three men were joined by Paul Oddo. Catania was informed that he should deliver the cocaine to Oddo directly, rather than to Dasti. Catania was handed the street address of the Riverside Plaza Hotel and told to go there with the cocaine (Tr. 75-77).

Catania made the delivery by himself. When he arrived at the Riverside Plaza Hotel with the nine kilograms of cocaine, Dasti, waiting downstairs in the lobby, directed Catania to room 718, where Oddo was waiting. The bag containing the cocaine was slipped through the door to Oddo and Catania left immediately (Tr. 80-81). Two months later, when Dasti was arrested in a gambling raid, Canadian police found on his person a slip of paper bearing the room number and name of the occupant of the same room in the Riverside Plaza Hotel where Catania had gone to deliver the cocaine (A. 2369-2376), Government Exhibit 23A). Moreover, on November 17, 1969, a woman and her daughter registered at the Riverside Plaza Hotel, under the name "Hedy and Marion Summer." The manager of the hotel later identified Paul Oddo as the man who appeared at the hotel from time to time as "Mr. Summer." The "Summers" ocupied room 718 until March 15, 1971 (Government Exhibit 45; A. 2202-2205). Moreover Catania testified that when he went to room 718 to deliver the cocaine, he had heard "voices and apparently a child may have been in there, a woman, a child . . ." (Tr. 82).

January 11

In the early morning hours of January 11, 1971, not long after the delivery of the cocaine to Paul Oddo, Joseph Cordovano arrived at the house of a Fannie Mae Garnet, the common-law wife of Alvin Lee Bynum, in Brooklyn. He was carrying five kilograms of cocaine, purchased with money provided by Alvin Lee Bynum. Cordovano had obtained the cocaine from James Altamura, who had apparently purchased or obtained nine kilograms of cocaine from

Paul Oddo. George Stewart, who had been summoned earlier by Cordovano and told to bring a packaging machine used to seal narcotics, was present, as was Alvin Lee Bynum (A. 2251-2255).[9]

Bynum kept one half kilo of the five kilograms taken to Brooklyn by Cordovano, mixing it with one half kilo of adulterant. Stewart, who noticed that the cocaine had a very unusual appearance—it had a brownish color and a sticky texture—managed to obtain a sample of the adulterated cocaine (A. 2254-2257, 2262). Cordovano and Stewart left with the other four and one half kilograms (owned by Bynum); Stewart later managed to obtain a sample of this quantity of cocaine (A. 2265-2266). On their way to Stewart's Manhattan apartment where the cocaine was to be temporarily stored, Cordovano asked Stewart to assist Altamura in selling the remaining four kilograms of cocaine in Altamura's possession, in order to raise the money to purchase the shipment of heroin that was expected to follow (A. 2263).

Later that day, Stewart met with special agents of the Bureau of Narcotics and Dangerous Drugs. He informed them of the previous night's activities and gave them the cocaine sample from the adulterated kilogram kept by Bynum; a week later, Stewart provided the agents with a sample taken from the four and one half kilogram supply, owned by Bynum, but by this time in Cordovano's possession[10] (A. 2265-2266, 2347-2348).

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[9] This scene was described in *United States* v. *Bynum*, 485 F.2d 490, 494 (C.A. 2, 1973):

> On January 10, 1971, Stewart, at Cordovano's request, proceeded to Bynum's residence with a device for sealing plastic bags . . . Cordovano subsequently brought to Bynum's apartment five kilos of cocaine which he stated he had purchased from Altamura.

[10] The lab report on the cocaine samples indicated that the January 11th sample (the one half kilogram) had been cut with an adulterant; the sample taken from the four and one half kilograms was 97.2% pure (A. 2352-2355).

In the morning (still January 11) after delivery, Catania met with Dasti at the Taft Hotel to receive payment for the nine kilograms of cocaine. Dasti, who mentioned that the cocaine "had some spots that were not normal" (Tr. 82-83), told Catania to return to the Riverside Park Hotel. There, Paul Oddo handed Catania a shoe box that contained $43,000 (Tr. 84, 88). At 11:30 that morning, Catania and Martinez checked out of the Taft Hotel (Tr. 84) and in the afternoon, checked into the Waldorf-Astoria Hotel (Government Exhibt 30; Tr. 85).

Later that day, Catania met wth Dasti at the Waldorf-Astoria.[11] Dasti explained that the full amount of money —$99,000—had not been paid because of the brown spots on the cocaine, but that the money would be forthcoming in a few days. Rather than wait in Montreal, Catania requested that Cotroni, whom he knew was going to Mexico in the next few days, bring the rest of the payments to Mexico City (Tr. 88-89).

January 12

At 7:34 a.m. on January 12, 1970, Catania and Martinez checked out of the Waldorf-Astoria; Martinez left for Dallas, Catania for Mexico City (Tr. 89-90). In Mexico City, Catania delivered the $43,000 to Asaf y Bala, explaining that the rest would come later (Tr. 90). Meanwhile, Dasti in New York telephoned Frank Cotroni in Montreal (A. 2009-2014; Government Exhibit 39, Conversation 10). After announcing that the "police are after

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[11] On page 20 of the appellant's brief, in a footnote, much is made of the fact that "on the morning" of January 11, Dasti was under surveillance and was observed traveling to the Bronx; therefore, the appellants conclude, it was impossible for Dasti to be meeting with Catania. What the appellants' brief fails to mention is that according to the testimony of DEA agent Gill, from approximately ten in the morning until three in the afternoon, when Dasti returned to the Drake Hotel, the surveillance had lost Dasti (Government Exhibit 3500-8, A. 1982-1984).

me, (swear word)" Dasti informed Cotroni that "the thing is finished,"—the deal was concluded. There was, however, a remaining problem. The additional money owed to Catania from the sale of the cocaine had to be gotten across the border to Canada. Dasti was afraid to take it across himself.

> Dasti: But what's gonna happen is that I'm, eh, but what's his name [a reference to Catania] took money and he left, you know?
>
> Cotroni: Okay, then okay.
>
> Dasti: Yeah you know, then the, Wednesday I have to come back: I can't stay here.
>
> Cotroni: Yes.
>
> Dasti: But I think the guys [Altamura and Company] they'll bring it back to me over there, Wednesday. Well I'd rather have them bring it over, than to take a chance myself.
>
> Cotroni: It's the best thing, yeah.
>
> Dasti: You know in case they search me, you know.
>
> Cotroni: Yeah!
>
> Dasti: They would say, what the fuck, what's the money doing here, see?
>
> Cotroni: Yes, yes.[12]

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[12] This conversation also illustrates the drawbacks to conducting coded narcotics transactions on the telephone. The two men attempted to arrange a meeting without mentioning the name of the exact location, to be held after Dasti arrived in Canada.

Dasti: Where we went the other night?

Cotroni: No, no, no, no. Not where we went to eat the other night!

Dasti: No, no, no.

Cotroni: Where we went the other time with my young brother-in-law before I left for there.

[Footnote continued on following page]

As Cotroni ended the conversation, he warned Dasti to "be careful."

January 13

On January 13, 1971, Frank Dasti and his wife checked out of the Drake Hotel and flew back to Canada (Government Exhibit 41; A. 1911). Immediately after arriving in Montreal, Dasti was telephoned by Cotroni (A. 2016). Dasti informed Cotroni that "the Americans"—*i.e.*, Altamura, and an associate, who were bringing the money to Canada—were expected to arrive at six o'clock that evening. The two men arranged to meet at two in the afternoon at the Victoria Sporting Club.

After Dasti and Cotroni met at the Victoria Sporting Club, Dasti phoned his wife A. 2015; Government Exhibit 39, Conversation No. 11) to inform her that he planned to "go by the hotel and wait for these two jerks to come in, you know?" The "jerks, however apparently were delayed; Dasti later phoned his wife to tell her that he was still waiting for their arrival—if they did not arrive that night, they would arrive the next morning (A. 2017-2018).

January 14

At 9:30 a.m., on January 14, James Altamura and an associate finally arrived and checked in to the Laurentian Hotel (A. 2424; Government Exhibit 50) in Montreal. Sometime during the day, the money—or a portion of it—was delivered to Frank Cotroni.

Dasti: Ah, yes, yes, yes, yes, It's alright that.
Cotroni: You know what I mean.
Dasti: Yes, yes, yes.
Cotroni: Well after . . .
Dasti: You were eating chickeni
Cotroni: What?
Dasti: You were eating chicken!
Cotroni: Yeah, yeah, yeah.

At 3:35 in the afternoon, Frank Cotroni left Montreal on a Canadian Pacific Flight to Mexico, carrying with him $7,000 (A. 2423). This money was delivered to Giuseppe Catania in Mexico City, but the payment was still far short of the agreed price for the nine kilograms of cocaine (Catania had expected to receive $99,000 but had received, thus far, only $50,000). The brown spots on the cocaine were the cause of the delay, but Cotroni assured Catania that full payment would be made within a matter of days (Tr. 90-91). Catania took the $7,000 to Asaf y Bala, again having to tell him that he must wait a few days before receiving the remainder of the money (Tr. 94).

January 15

On January 15, 1970, Cotroni placed a telephone call from Mexico to Frank Dasti at the Victoria Sporting Club (A. 2019-2024; Government Exhibit 39, Conversation 12). Cotroni described his meeting with Catania the day before:

> Cotroni: What I wanted to say, I spoke with him yesterday.
>
> Dasti: Yeah!
>
> Cotroni: He is not very happy. You know the rent, it has to be respected. He says he waited, hm, twenty four hours, you know for, him, to get the okay.[13]

Later in the conversation, in reference to the forthcoming heroin, Cotroni mentioned that he had spoken to Catania about the "other thing," but that he (Cotroni) could not decide whether the "rent"—the price—of the cocaine should be lowered. Presumably, Cotroni was worried that if Catania did not receive the expected payment for the cocaine,

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[13] Apparently a reference to the period after the delivery that Catania spent waiting at the Waldof-Astoria before returning to Mexico with less than half the expected payment (Government Exhibit 30, Tr. 83-89).

the heroin deal would be jeopardized: "To lower it, to lower it, I don't know."

In addition to this problem, the four kilograms of cocaine still in Altamura's possession, some or all of which may be unusable because of the brown spots, remained to be disposed of. Later in the day, Paul Oddo, in New York, phoned Dasti (A. 2024-2030; Government Exhibit 39, Conversation No. 13). Oddo was having difficulty getting rid of the remaining four kilograms of cocaine (or helping Altamura to sell it).

> Oddo: You know, I got those things on hand you know.
>
> Dasti: Yeah, I know that. You could. . . .
>
> Oddo: Very damaged.
>
> Dasti: Yeah, huh.
>
> Oddo: That they gotta cut some a that . . . It's a loss on each one . . . I, I tell you they're bad, Frank; I saw them.

Dasti stated that he would have an answer for Oddo sometime later.

January 16

At 10:00 a.m. Paul Oddo phoned Dasti, who was this time at a pay phone in the Laurentian Hotel (A. 2025; Government Exhibit 39, Conservation No. 14). Dasti appeared willing to take back the "damaged" cocaine. Oddo, however, had an offer from his buyer.

> Oddo: Here's what they explain to me, Frank.
>
> Dasti: Hm.
>
> Oddo: They gotta cut out part a that . . . They could use it . . . It's usable . . . But they gotta cut out part. There's a waste to it.
>
> Dasti: Yeah.
>
> Oddo: Now, they came to a figure, first.

Dasti: Yeah.
Oddo: 18.
Dasti: Yeah, for the two.
Oddo: Then it went up to 20.
Dasti: Yeah.
Oddo: And that's it, and they won't go no further.

Dasti, however, told Oddo that "I can't make a decision like that so fast." The decision, of course, was whether to sell the four damaged kilograms for the approximate price of two normal kilograms of cocaine—*i.e.*, two kilograms for a price of $20,000.

Later, Oddo phoned Dasti again (Oddo appeared to have a habit of talking with Dasti on the telephone and then calling him back soon after) (A. 2026-2030; Government Exhibit 39, Conversation No. 15). This time Dasti had an answer for Oddo's offer: "Whatever you told me it's all right," referring to the two-for-one arrangement. Oddo responded by saying that he would be there (Canada) "tonight or in the morning."

At 1:30 p.m. Dasti phoned Cotroni, then in Acapulco (A. 2044-2051; Government Exhibit 39, Conservation No. 16). He explained to Cotroni that "it takes two to make one," *i.e.*, two kilograms of the damaged cocaine to make one kilogram of usable cocaine.[14] The problem was, Dasti explained, if they did not agree to the two-for-one, the buyers would cancel their other "contracts" (for the expected shipments of heroin). Cotroni, in agreement, told Dasti to "fix it your way."

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[14] In their conversation, Dasti told Cotroni that the offer for the damaged cocaine was $14,000—$6,000 less than Oddo had actually offered. Dasti, who had done much of the legwork for Cotroni in this deal, perhaps decided that his efforts deserved additional compensation.

That evening, Oddo arrived in Montreal to deliver the payments for the four damaged kilograms of cocaine. He and Dasti arranged to meet at 9:45 the next morning, a Sunday (A. 2053).

January 20

Dasti called Frank Cotroni in Acapulco (A. 2055-2060; Government Exhibit 39, Conversation No. 17). Cotroni informed Dasti that he planned to meet with "the guy, here" —an apparent reference to Catania—to discuss the "lease" or, in other words, the final payments to Catania for the cocaine. But Dasti announced to Cotroni that the "lease is finished," *i.e.*, payment on the damaged cocaine had been made by Oddo and Dasti had the money.

> Cotroni: But hm, did you receive the thing? Yes.
> Dasti: Ah yes!
> Cotroni: Ah, you have it on hand!
> Dasti: Ah yes.
> Cotroni: I will call you back, I will tell you what to do.
> Dasti: All is put away.[15]

Now, with some money available, Cotroni could settle accounts with Catania. He informed Dasti that he planned "to see him (Catania) tomorrow. I'll see what he wants . . . And, hm, if he wants it, I will call you, and we'll have it sent." In addition to settling with Catania, Cotroni also intended to speak to him about the "other thing," the shipments of heroin. Dasti agreed, knowing that he had been able to sell the cocaine only because the buyers believed that a source of heroin was part of the deal: "Yeah, because they are waiting after it."

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[15] As will be shown, Dasti was apparently referring to the Bank of Nova Scotia, where the money had been deposited.

In a series of phone calls, Cotroni (from Mexico) and Dasti (in Montreal) made the arrangements to have the money transported to Cotroni. Guido Orsini, an associate of Cotroni's, was asked to carry the money to Mexico. He would meet Dasti on the 22nd of January at the corner of Peel and St. Catherine Streets, in front of a drugstore. There, Dasti would give Orsini $14,000. That night Orsini would leave Montreal and fly to Acapulco, Mexico, where Cotroni would be waiting for him (Cotroni promised that Orsini, who would have to carry the money through Mexican Customs, would be asked "absolutely nothing" by the Mexican Customs officials) (A. 2060-2066, 2117-2118).

January 22

In the morning, an extensive surveillance was set up by Canadian and American narcotics agents in the vicinity of Peel and St. Catherine Streets in Montreal. At 10:05 a.m., Frank Dasti emerged from Berke's Pharmacy, where he had been waiting with Guido Orsini and a third individual, entered the Bank of Nova Scotia, and emerged ten minutes later carrying a parcel wrapped in brown paper. He then walked back into the pharmacy and handed the package to Orsini, saying "I had to get it from the box." Orsini replied, "No problem. I am going to leave for Mexico this afternoon." Shortly afterwards, Orsini and Dasti left the drugstore (A. 2067-2076, 2093-2098). That evening, at 5 p.m., Orsini left Montreal and flew to Acapulco, arriving at 9:15 p.m. (A. 2065-2066).

Not long after Orsini arrived in Mexico with the $14,000 payment for the cocaine, Cotroni personally delivered the money to Giuseppe Catania (the money was turned over to Asaf y Bala). Later, Catania met with Cotroni and Orsini and Orsini at the Presidente Hotel in Mexico City. The main topic of discussion was the other thing—the heroin. Catania was asked whether it would be possible to obtain heroin from Europe and whether it could be gotten from Mexico to the United States via the same route utilized for

the cocaine. Yes, Catania indicated, all of this was possible; but first he would have to receive full payment for the nine kilograms of cocaine ($35,000 was still outstanding) (Tr. 94-98).

March 1971-September 1971

On March 17, 1971, the Quebec Police Force conducted a gambling raid at the Victoria Sporting Club. Among those arrested was Frank Dasti (A. 2368-2376). In the succeeding months, Catania made inquiries of both Orsini and Cotroni about the remaining payments on the cocaine. In September, 1971, Catania agreed to accept an additional $14,000 as a final payment, but he only received a total of $500 (Tr. 97-103).

Catroni was not arrested by Canadian authorities until November, 1973; he was extradited to the United States in October 1974 (A. 296-297).

ARGUMENT

POINT I

The wiretap evidence was properly admitted.

A. Introduction and Summary

Appellants argue that the wiretap evidence should have been suppressed because the seizure of their conversations in Canada by Canadian law enforcement officers (1) violated Title III of the Omnibus Crime Control Act of 1970 (18 U.S.C. § 2510, et seq.); and (2) was unlawful under Canadian law. Moreover, even though appellants concede that—regardless of the validity of the seizure under Canadian law—the wiretap evidence would not have been excluded in Canada at the time it was seized, it should have been excluded here by the district court. This

argument rests on the subsequently enacted Protection of Privacy Act of Canada (App. 121-132), effective June 30, 1974, which regulates the use of wiretapping by law enforcement officials and contains an exclusionary rule similar to that contained in Title III of the Omnibus Crime Control Act of 1970. Since the Protection of Privacy Act was in effect at the time of the trial, appellants argue that its exclusionary rule should be applied to wiretapping which took place prior to the effective date of the Act. These arguments are without substance.

First, appellants have not overcome "the strong presumption" that Acts of Congress—particularly penal statutes—are deemed not to apply to the conduct of a non-citizen acting in a foreign country.[16] There is nothing in the language or legislative history of Title III to indicate that Congress intended it to apply extraterritorially; in fact, both the language and the legislative history suggest otherwise. Moreover, even assuming that the Canadian law enforcement officers violated Title III, the exclusionary rule contained in Section 2518(10)(a) should not be construed to apply to the evidence seized by them. Our position on this issue is based on the fact that in Section 2518(10)(a), Congress indicated that it had no intent "to press the scope of the suppression role beyond present search and seizure law". S. Rep. No. 1097, 90th Cong. 2d Sess. 1968 Code Congressional and Administrative News, p. 2185. Under well-settled principles of search and seizure law, suppression of evidence is not required unless it was conducted by state or federal law enforcement officers; it has no application to searches conducted by private persons or by foreign law enforcement officials who, as in this case, are not acting under the supervision, control or direction of the United States (App. 196).

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[16] *United States* v. *Pizzarusso*, 388 F.2d 8, 9 (C.A. 2, 1968).

Second, if we are correct in our submission that the wiretapping here did not violate the United States Code, there is no need even to engage in any discussion of the issue whether Canadian law was violated by the wiretapping or whether the evidence (regardless of how seized) would be admissible in a Canadian trial. Here, the cases dealing with the admissibility of evidence obtained in violation of state law provide the applicable principle of law. It is settled in those cases that the admissibility of such evidence is governed exclusively by whether the evidence was obtained in violation of *federal* law, and the same standard should apply to evidence allegedly obtained in violation of the law of a foreign country by foreign law enforcement officers. Moreover, it is clear that Chief Judge Mishler's finding that the evidence here at issue was not seized in violation of Canadian law and would be admissible in a Canadian trial, is plainly correct.

Finally, appellants' claims, under both United States and Canadian law, ignore altogether the issue of standing. It is settled law that each appellant has standing to object only to the admissibility of evidence seized in violation of *his* rights. Thus, of the thirty-two conversations here at issue, appellant Cotroni had standing only to raise violations of his rights under Title III attendant upon only eight of the seizured the conversations. (The same, of course, is true for appellant Dasti who has standing to object to the admission of only those conversations to which he was a party.)

The issue of standing becomes significant in determining whether the conviction of the appellant Cotroni can be sustained—under the harmless error doctrine—even if the eight conversations were illegally seized. While we do not believe that admission of the conversations to which Dasti was a party can be deemed harmless as to him, we do submit that given the corroboration of the testimony of

Catania which was supplied by the calls to which Dasti and others were a party (and to which Cotroni was not), and the physical surveillance undertaken at the same time, any error in the admissibility of the eight conversations is harmless error as to him.

B. The wiretapping by Canadian law enforcement officials in Canada did not violate Title III of the Omnibus Crime Control Act of 1968.

1. The wiretapping conducted in this case was done in Canada by Canadian law enforcement officers. All conversations which were introduced in evidence were overheard in Canada and the calls either originated there or were directed to persons living in Canada; and Chief Judge Mishler found, after a hearing, that the United States "did not in any way initiate supervise, control or direct the wiretapping" (App. 196). Appellants allege that because these conversations, which involved calls between Mexico and Canada and New York and Canada, were transmitted over "the United States communications network," they would only have been seized in accordance with the procedures set out in Title III of the Omnibus Crime Control Act of 1968.[17] Since Section 2511 makes it illegal to engage in wiretapping except as specifically provided for in Title III, and since Section 2518(10)(a) requires the suppression of "unlawfully intercepted" conversations, appellants argue that the failure of the Canadian law enforcement officials to comply with Title III mandates the suppression of these conversations. Moreover, although appellants allege that the wiretapping conducted here violated Canadian law, under their construction of Title III, Section 2511—which makes it an offense to

[17] Seven of the thirty-two conversations which were overheard involved calls solely between two points in Canada (Appellants' Brief, Appendix, p. 2a-3a) and the seizure of those calls would plainly not violate Title III.

engage in wiretapping except as authorized by Title III —would be applicable even if the wiretapping was legal in Canada, and even if it was expressly authorized under procedures similar to those provided for in Title III.

There is absolutely no support for such a construction of Title III. The law is clear that "the legislation of the Congress, unless the contrary intent appears, is construed to apply within the territorial jurisdiction of the United States." *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932); *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949); *Air Line Stewards and Stewardesses Association International* v. *Trans World Airlines Inc.*, 273 F.2d 69, 70 (C.A. 2, 1959). Moreover, it is also well settled that "the criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extra-territorial effect." *United States* v. *Flores*, 289 U.S. 137, 155 (1933). Indeed, there is a "strong presumption" that Congress does not intend such statutes to apply extra-territorially. *United States* v. *Pizzarusso*, 388 F.2d 1, 8-9 (C.A. 2, 1968). As the Supreme Court held in *United States* v. *Bowman*, 260 U.S. 94, 97-98 (1922):

> We have in this case a question of statutory construction. The necessary *locus*, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdic-

tion, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.

2. The appellants have failed to overcome the "strong presumption" here that Congress did not intend the provisions of Section 2511 to have any extra-territorial effect. The legislative history of Title III does not indicate that Congress even considered that the provisions of Title III would apply to foreign law enforcement officials acting solely within the territorial limits of their own country and intercepting calls originating there or directed to parties there residing. Appellants rely almost exclusively upon the definition of "wire communication" contained in Section 2510(1) to sustain their burden. But that merely defines a wire communication as one transmitted over facilities, which are operated by a common carrier "for the transmission of interstate or foreign communication." The Senate Judiciary Committee Report indicates that this provision is intended to apply to communications carried in whole or part "through our Nations communications network" (S. Rep. 1097, 90th Cong., 2d Sess., 1968, U.S. Code & Adm. News, p. 2178). But, while Section 2510, and the Senate Judiciary Committee Report, indicate that such wire communications are protected from domestic interception except as authorized by Title III, they do not indicate that, in making it an offense to engage in the unauthorized interception of wire communication, Congress intended to regulate the conduct of foreign law enforcement officers acting solely within their own country. Indeed, there is some support for a contrary view.

The findings accompanying Title III begin by observing that: "Wirecommunications are normally conducted through the use of facilities which form a part of an *interstate* network. The same facilities are used for *interstate and intrastate* communications. There has been extensive

wiretapping carried on without legal sanctions and without the consent of any of the parties" (Pub. L. 90-351, Section 801, emphasis supplied. Accordingly, as the Senate Judiciary Committee oberved, "[t]he need for comprehensive, fair and effective reform setting uniform standards is obvious. New protections for privacy must be enacted. Guidance must be given to *State and Federal law enforcement officers*. This can only be accomplished through national legislation." S. Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S. Code & Adm. News, p. 2156 (emphasis supplied). Additional evidence that Congress was speaking to conduct undertaken in the United States by State and Federal law enforcement officers may be found in other provisions of Title III. So, for example, Section 2511(2)(d) permits the interception of a wire communication with the consent of a party "unless such communication is intercepted for the purpose of committing any criminal or tortious act *in violation of the Constitution or laws of the United States or of any state* or for the purpose of committing any other injurious act" (emphasis supplied). Moreover, only the Attorney General or a comparable State official may authorize an application to a state or federal judge for an order authorizing state or federal law enforcement officials to wiretap in search of evidence regarding violations of specified provisions of state or federal law (18 U.S.C. § 2516).

More "significantly", as this Court observed in *United States* v. *Toscanino*, 500 F.2d 267, 279-80, *petition for rehearing en banc denied*, 504 F.2d 1380 (C.A. 2, 1974), Title III "makes no provision for obtaining authorizations for a wiretap in a foreign country." Accordingly, if Section 2511—which makes it a crime to wiretap except as authorized by Title III—is applicable to wiretapping in a foreign country, it would mean that no wiretapping could ever be undertaken by foreign law enforcement officials except at the risk of violating United States law if they should happen to overhear a conversation directed to or originating in the United States (or even a third country if the conversation is trans-

mitted over "our Nation's communications network").[18] Absent compelling evidence to support such a preposterous construction of Title III, it should be rejected here. Indeed, one would have thought that the issue was resolved in *United States* v. *Toscanino, supra.* There it was explicitly held that "18 U.S.C. § 2510, et seq., has no application outside the United States" (500 F.2d 279-280):

> With respect to Toscanino's request pursuant to 18 U.S.C. § 3504 for a statement from the government affirming or denying the occurence of an "unlawful act" in the form of eavesdropping or surveillance on the part of agents of the United States Government in Uruguay, we agree with the government that the federal statute governing wiretapping and eavesdropping, 18 U.S.C. § 2510, et seq., has no application outside of the United States. The term "wire communication," as used in the statute, 18 U.S.C. § 2510 (1), is intended to refer to communications "through *our Nation's* communications network." See 1968 U.S. Code Cong. & Admin. News, 90th Cong., 2d Sess. p. 2178 (emphasis added). In prescribing the pro-

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[18] It is doubtful that such a penal sanction would have any meaningful deterrant effect; that of course, is one of the reasons for the rule that statutes are not generally held to apply to the conduct of non-citizens in foreign countries. As Justice Holmes observed in *American Banana Co.* v. *Fruit Co.*, 213 U.S. 347, 356-357 (1909):

> Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts. A threat that depends upon the choice of the party affected to bring himself within that power hardly would be called law in the ordinary sense.

Similarly, as we show, *infra*, pp. 36-38, an exclusionary rule applicable to trials in the United States is likely to have even less affect on such conduct by foreign law enforcement officials.

cedures to be followed in obtaining a wiretap authorization, see 18 U.S.C. § 2518, the statute significantly makes no provision for obtaining authorizations for a wiretap in a foreign country.

The holding in *United States* v. *Toscanino* is even more apposite here. The allegations in that case were that *United States* law enforcement officers were engaging in wiretapping in Uruguay for the purpose of obtaining evidence regarding a conspiracy to import heroin into the United States. Of course, such wiretapping—if it took place—was likely to result in the seizures of long distance conversations which at one point or another passed through "our Nations' communications network". Yet, in that case, it was held that Title III was inapplicable "outside the United States".[19] That holding was clearly correct.

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[19] The opinion in *United States* v. *Toscanino*, went on to hold that such wiretapping by United States law enforcement officers would offend the Fourth Amendment. Here, in light of Chief Judge Mishler's finding that the United States "did not in any way initiate, supervise, control or direct the wiretapping" (A. 196), appellants do not allege any violation of the Fourth Amendment. Accordingly, we have no occasion to ask for reconsideration of this aspect of the holding in *Toscanino*. *Cf. United States ex rel. Lujan* v. *Gengler*, 510 F.2d 62 (C.A. 2, 1975), *certiorari denied*, — U.S. — (1975). Since three of the five judges who spoke to this issue in *United States* v. *Toscanino, supra*, either expressly disagreed with the holding (see Judge Anderson's concurring opinion [500 F.2d at 281-282]) or voiced serious doubt as to its validity (see Judge Mulligan's opinion—joined by Judge Timber's [504 F.2d at 1381]), we do not believe that such a request would be inappropriate if the issue were presented.

C. The wiretap evidence should not be suppressed even if the conversations were seized in violation of Title III of the Omnibus Crime Control Act of 1968.

Section 2515 provides that no part of the contents of any wire or oral communication, and no evidence derived therefrom, may be received at certain proceedings, including trials, "if the disclosure of that information would be in violaton of this chapter." "What disclosures are forbidden, and are subject to motions to suppress, are in turn governed by § 2518(10)(a)." *United States* v. *Giordano*, 416 U.S. 505, 524 (1974). Section 2518(10)(a) provides in pertinent part:

> Any aggrieved person in any trial, * * * may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

The only subdivision of Section 2518(10)(a) which would be applicable here is subdivision (a), which requires the suppression of "unlawfully intercepted" communications. We recognize that if the Canadian law enforcement officials violated Section 2511 in seizing the conversations here at issue, then a literal application of subdivision (a) would require exclusion of this evidence at the behest of an "aggrieved person." We believe, however, that Congress intended this exclusionary rule to apply solely to communica-

tions "unlawfully intercepted" by state and federal law enforcement officials or those acting under their supervision, control and direction.

The Senate Judiciary Committee which drafted Title III, explicitly stated that, in adopting the exclusionary rule contained in Section 2518, it did not intend "to press the suppression role beyond present search and seizure law." S. Rep. No. 1097, *supra;* 1968 U.S. Cong. & Adm. News, p. 2184-85:

> "Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter . . . The provision must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly (*Nardone* v. *United States,* 302 U.S. 379 (1937)) or in directly obtained in violation of the chapter. (*Nardone* v. *United States,* 308 U.S. 338 (1939).) There is, however, no intention to change the attenuation rule . . . Nor generally to press the scope of the suppression role beyond present search and seizure law . . . But it does apply across the board in both Federal and State proceeding[s] . . . And it is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy . . . The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications."

The scope of "the suppression role * * * under present search and seizure law" is limited to illegal acts of state or federal law enforcement officials; it has no application to

evidence illegally obtained by a private individual [20] or by foreign law enforcement officials who, as the district court here found (App. 196), were not acting under the supervision, direction or control of the United States.[21]

Moreover, aside from the fact that the application of the exclusionary rule here would be inconsistent with the expressed intent of Congress, there is no policy reason which would justify its application in these circumstances. The purpose of the exclusionary rule contained in Sections 2515 and 2518, as the Senate Judiciary Committee observed, is to "compel compliance with the other prohibitions of the expressed intent of Congress, there is no policy reason which chapter [Title III]." See, *United States* v. *Giordano, supra*, 416 U.S. at 527-528. Where law enforcement officials of a foreign country engage in wiretapping in their own country and for their own purposes, they are hardly likely to be deterred by the fact that such evidence would not be admissible at a trial in the United States.[22] In this case, the Canadian law enforcement officials had an "interest of their own" in installing the wiretaps in Canada (see, *United*

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[20] *Burdeau* v. *McDowell*, 256 U.S. 465 (1921); *United States* v. *McGuire*, 381 F.2d 306, 313 n. 5 (C.A. 2, 1967), *cert. denied*, 389 U.S. 1053 (1968); *United States* v. *Harper*, 458 F.2d 891, 893 (C.A. 7, 1971), *cert. denied*, 406 U.S. 730 (1972).

[21] *Birdsell* v. *United States*, 346 F.2d 775, 782 (C.A. 5), *cert. denied*, 382 U.S. 963 (1965); *United States* v. *Welsh*, 455 F.2d 211 (C.A. 2, 1972). The mere fact that an agent of the Drug Enforcement Administration was permitted to review the evidence obtained by the Canadians does not, contrary to appellants' claim (Br. 26), provide any basis for excluding the evidence where, as here, the United States "did not in any way initiate, supervise or direct the wiretapping" (App. 196). See *United States* v. *Blum*, 329 F.2d 49 (C.A. 2, 1964), *cert. denied*, 377 U.S. 993; *United States* v. *Cangiano*, 464 F.2d 320, 324-325 (C.A. 2, 1972).

[22] This is also true with respect to private individuals who engage in illegal wiretapping. Such activity is usually undertaken for purely private purposes; and, if it is not deterred by the threat of criminal prosecution, is not likely to be deterred at all.

States v. *Welsh*, 455 F.2d 211, 213 [C.A. 2, 1972]) and they would not have been deterred from engaging in that activity by the fact that the evidence obtained was inadmissible in a criminal prosecution in the United States. Under these circumstances, barring a showing that the foreign officials were acting under the supervision, control or direction of the United States, no legitimate policy consideration would be vindicated by applying the exclusionary rule here. As the Court held in *United States* v. *Lira*, — F.2d —, No. 74-2567 (C.A. 2, April 14, 1975) Slip op. 2875, 2877:

> "[W]here the United States plays no direct or substantial role in the misconduct and the foreign police acted not as United States agents but merely on behalf of their own government, the imposition of a penalty [here] * * * would not deter any illegal conduct."

In sum, we submit that it is plain that Congress intended the exclusionary rule to apply only where evidence has been obtained illegally by United States law enforcement officials and not by private individuals or foreign law enforcement officers who are acting independently and in furtherance of their own interest. Indeed, to apply the exclusionary rule here would serve no rational purpose and could result in the release of two international drug traffickers.[23] Accordingly, we believe that this is one of those cases in which the literal language of a statute should not

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[23] While it is true (assuming appellants are correct in their arguments regarding the application of Title III) that evidence obtained in violation of Title III was admitted into evidence, Section 2518(10), which accords standing to obtain suppression of such evidence solely to "aggrieved persons", shows that Congress intended to adhere to "present search and seizure law" even if it results in the admission of such conversations. So for example, twenty-four of the thirty-two conversations, to which appellant Cotroni would have no standing to object, are admissible against him even if they were obtained in violation of Title III. See, *infra*, pp. 48-52).

be applied and that, instead, this Court should look beyond the words to the purpose of the act and the expressed intent of Congress. *United States* v. *American Trucking Association*, 310 U.S. 534, 543-544 (1940); see, also, *J. C. Penney Co.* v. *Commissioner of Internal Revenue*, 312 F.2d 65, 68 (C.A. 2, 1962); *In re Persico*, — F.2d —, (C.A. 2, June 19, 1975), Slip. op. 4129, 4174-4179.

D. The admissibility of the seized conversations does not turn upon whether the evidence was obtained in violation of Canadian law or whether it would be admissible in a Canadian Court.

Appellants have devoted a substantial portion of their brief to the proposition, which was rejected by the district court (App. 193-211), that the conversations at issue here were seized in violation of Canadian law and that they would be inadmissible today in a Canadian court. While we shall show that this claim is without substance, we submit that it is unnecessary to reach this issue here, if we are correct in our argument that the conversations were not seized in violation of Title III, or even if they were, that Title III does not mandate their suppression.

1. It is settled that "[t]he question of admissibility of evidence does not turn upon whether evidence was obtained in violation of state law." *United States* v. *Infelice*, 506 F.2d 1358, 1365 (C.A. 7, 1974), *cert. denied*, — U.S. —, 95 S. Ct. 778 (1975); *United States* v. *McGuire*, 381 F.2d 306, 315 (C.A. 2), *cert. denied*, 389 U.S. 1053 (1968); *United States* v. *Sifuentes*, 504 F.2d 845 (C.A. 4, 1974). *Cf. Elkins* v. *United States*, 364 U.S. 206, 223-224 (1960); *United States* v. *Beigel*, 370 F.2d 751, 756 (C.A. 2), *cert. denied*, 387 U.S. 930 (1967); *United States* v. *Cuiotta*, 413 F.2d 1343, 1345 (C.A. 2, 1969), *cert. denied*, 396 U.S. 1019 (1970).

If this be the rule with respect to evidence obtained in violation of state law, there is no rational basis to apply a different rule with respect to evidence allegedly seized in violation of the law of a foreign country by foreign law enforcement officials. *Cf. United States* v. *Lira*, — F.2d —, No. 74-2567 (C.A. 2, April 14, 1975) Slip Op. 2875, 2877. Of course, even if Canadian law was violated, the application of the exclusionary rule here will not deter such violations in the future. If the sanctions provided by Canadian law are insufficient to deter wiretapping undertaken for purely domestic reasons, the possible exclusion of such evidence in a United States court (should evidence of an offense under our law be discovered) is hardly likely to have any effect. Acoordingly, it is irrelevant whether or not Canadian law was violated or whether the evidence would be admissible in a Canadian court.

2. A second reason why it should not matter that the wiretapping violated Canadian law, is that the evidence would have been concededly admissible in Canada at the time it was seized even if it was seized illegally (App. 559, 924). If Canada did not feel that an exclusionary rule was essential at that time to deter violations of its own law by Canadian law enforcement officers, then we fail to see why a United States court should apply such a rule here. While a statute was enacted in Canada after the wiretapping at issue here took place, which is similar to Title III and contains an exclusionary rule (App. 121-132), there is no reason to apply that exclusionary rule to conduct which took place prior to its enactment. Indeed, the exclusionary rule contained in Title III was held to be inapplicable to illegal wiretapping by state law enforcement officials which took place prior to its effective date, and which was not subject to any exclusionary rule at the time it was seized.[24]

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[24] The seizure violated former Section 605 of the Federal Communications Act (47 U.S.C. 605); at that time conversations so siezed were not subject to exclusion in a state criminal case. See *Schwartz* v. *Texas*, 344 U.S. 199 (1952).

See *United States ex rel. Rosner* v. *Warden*, 378 F. Supp. 1064 (S.D.N.Y., 1974), affirmed 510 F.2d 968 (C.A. 2, 1975). There Judge Gurfein held, in language equally apposite here (378 F. Supp. at 1068):

> "If the mischief is that of the *police* in obtaining the illegal evidence and if that has already occurred, there is no longer any deterrent effect in its exclusion from evidence when the rules have changed. The sanction, if applied restrospectively to old fruits of the police action, would not deter what has already been done."

See, also, *People* v. *Feinlowitz*, 29 N.Y. 2d 176 (1971), *cert. denied*, 405 U.S. 963 (1972); *People* v. *Daria*, 38 A.D. 2d 833 (A.D. 2, 1972); *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 247, 249-250 (E.D. Pa., 1968). This reasoning was reaffirmed in *United States* v. *Peltier*, — U.S. —, 17 Cr. L. Rep. 3134, 3136 (June 25, 1975). There, in discussing the "teaching" of its retrocativity decisions, the Supreme Court stated:

> "The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence that they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by the introduction of evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner."

Moreover, although it would not be binding in any event, the Canadian courts have held that Protection of Privacy Act of Canada, upon which appellants rely, does not require the exclusion of evidence obtained prior to its effective date (June 30, 1974).[25] See, *Regina* v. *Demeter*,

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[25] These cases also hold that wiretapping of the kind conducted here prior to June 30, 1974, was not a violation of Canadian law.

19 C.C.C. [Canadian Criminal Cases] 2d 321 (1975); App. 2801; *Regina* v. *Lesarge*, Court for General Sessions of the Peace, (1974), App. 256; *Regina* v. *Dejardins*, Queens Court (Criminal Division) (1974), App. 2817 *infra*.[26] Moreover, even one of appellants' own "expert" witnesses, Serge Menard, declined to opine that it would be so applicable. Indeed, he strongly suggested that it would not be applied retroactively. Thus he testified (A. 965):

> "Q. Are you saying that the protection of privacy act which was passed or actually came into effect, rather, on June 30th of 1974 is retroactive in that any wiretapping conducted before the Act was in existence is subject to the Act as far as admissibility into evidence is concerned?
>
> A. It is certainly not retroactive, but what I said is that I want to limit my opinion as to the admissibility of evidence obtained by wiretapping, to wiretapping made before the 30th of June of '74, because I still wonder what the term "lawfully" means in Section 178.16.
>
> If a Judge is convinced that evidence was obtained by wiretapping prior to the period June 1974, by illegal means, I think it would be open for many, maybe to decide that it was not lawfully obtained and therefore it isn't admissible. I don't think this is the present case." [27]

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[26] Of course, the exclusionary rule in the Protection of Privacy Act of Canada is by its terms applicable only to Canadian proceedings (Section 178.16(3), App. 127).

[27] A second expert witness, who had known appellant Cotroni since he was sixteen and acted as an attorney for both Cotroni and appellant Dasti (App. 1083-1084), testified unequivocally that it would be applied retroactively (App. 1080). No support was offered for this opinion and it was not credited by the district court.

Although we produced expert testimony affirmatively supporting our reading of the Protection of Privacy Act (App. 819-820) we are content to rely on the Canadian decisions.

E. The electronic surveillance was not unlawful under Canadian law prior to June 30, 1974.

Although we have already shown that it is irrelevant whether the wiretapping here at issue violated Canadian law at the time the conversations were seized, it is plain that no such violation took place. Appellants' argument is predicated upon two separate statutes which were in effect at the time, Section 25 of An Act To Incorporate The Bell Telephone Company of Canada, 1880, Chapter 67 (App. 104) and Section 24 of the Telephone Companies Act of Quebec (1964), Chapter 283 (App. 116-117). Neither of these statutes support appellants claims.

1. Section 25 of an act to incorporate the Bell Telephone Company of Canada.

Section 25 provides that (App. 104):

> "Any person who shall wilfully or maliciously injure, molest, or destroy any of the lines, posts, or other material or property of the Company, or in any way wilfully obstruct or interfere with the working of the said telephone lines, or intercept any message transmitted thereon, shall be guilty of a misdemeanor."

Appellants contend, first, that the method by which the wiretapping was accomplished "injured or molested the lines or other material of the Company" and "interfere[d] with the working of the said telephone lines." According to appellants (Br. 28-29):

> A telephone engineer testified that when Method # 1 was used, the tap substantially diminished the

> service to the subscriber whose line was tapped by creating a loss of function of the phone. And when Method # 2 was used, the many telephone wires left open on a twenty-four hour basis at police headquarters caused telephone service across the entire city of Montreal to be adversely affected since the use-probabilities engineered into the Montreal telephone system, both in the central office near the police headquarters and in the central office near the suspect phone, were substantially diminished (App. 1346-1379).

These factual allegations are without support in the record. The "telephone engineer" who testified at trial, did not say that the wiretapping here at issue "substantially diminished the service to the subscriber." Indeed, he testified that there was no noticeable diminution of service (A. 1370-1371):

> "Q. * * * Is it your testimony that there would be no diminution of service on the so-called suspect phone; in other words, a person using a suspect phone, if the interception was done properly, or the wiretapping was done properly, would not notice that the phone was being tapped? A. That's correct, he would never know it.
>
> * * * * *
>
> Q. Aside from some scientific calculation, I think you referred to some equipment you might use to determine diminution of service, would there be any noticeable diminishing of service by the use of either of those two methods, either the bridge tap or the induction coil tap? A. The subscribers would never know it."

Similarly the record simply does not support the claim that "telephone service across the entire city of Montreal" was affected by the wiretapping. The wiretapping itself, that is the actual interception and seizure of the conver-

sation, had no such effect. What allegedly caused the adverse consequences to which appellants allude was the perfectly legal practice of keeping several telephone lines open at the police headquarters on a twenty-four hour basis to receive and record the previously intercepted conversations. And, in any event, the testimony on this issue was vague and speculative (A. 1374-1375).[28]

These facts aside, neither of the appellants have standing to challenge the legality of the wiretapping on these grounds. The statute making it an offense to injure or interfere with telephone lines was obviously enacted to protect the property of th Bell Telephone Company of Canada.[29] The mere fact that some law—not intended to protect their privacy may have been violated—does not afford appellants standing to complain about the seizure of their conversations. See, *e.g.*, *United States* v. *Poeta*, 455 F.2d 117, 122 (C.A.2), *cert. denied*, 406 U.S. 948 (1972). Moreover, it is also plain that Section 25 was not intended to apply to, or prohibit, wiretapping *per se*. While Section 25, makes it an offense to "intercept any message" transmitted over the lines (A. 104), there was expert testimony (A. 827) supported by judicial decision, holding that these words apply only to conduct which actually impedes the conversation between the two parties; and that it has no application to wiretapping which merely involves overhearing of a conversation. *In re Cope-*

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[28] There is also no support in the record for the statement that the Bell Telephone Company of Canada "would never have consented to permit the tapping of a subscriber's phone or the open twenty-four hour service of any line without being properly compensated therefor" (Br. p. 29). The representative of Bell Telephone Company of Canada, who was called to testify at the hearing, was not even asked whether the company would have consented to permit the tapping of the phones here. Moreover, he testified that there was no extra charge for keeping a line open twenty-four hours a day (App. 1536).

[29] The very nature of the offense created by Section 25—a misdemeanor—would seem to indicate that the offenses proscribed were intended to protect property of the telephone company rather than to protect against any serious invasion of privacy.

land and Adamson, 7 C.C.C. 2d 393, 400 (1972) (A. 229); *Dasti* v. *Patenaude*, Court for Sessions of the Peace (1974), (A. 2826, 2843), *affirmed* Superior Court of Quebec (1975) (A. 2856, 2888). In the latter case, an action was brought by the wife of appellant Dasti and involving the very wiretaps here at issue, the Superior Court of Quebec affirmed the holding of the Court for Sessions of the Peace that Section 25 does not apply to "'wiretapping which does not impede its progress'" and it affirmed the finding that "the audio surveillance * * * created [no] disturbance of the conversation". Accordingly, we believe that it is plain that the wiretapping here did not violate Section 25 and that, to the extent that any damage was caused to the telephone lines, appellants do not have any standing to raise that issue.

2. Section 24 of the Telephone Companies Act of Quebec

Section 24 provides (A. 117):

> "Every person who listens to or acquires knowledge of any conversation or message passing over the lines of a telephone system, not addressed to or intended for such person, and divulges the same or the purport or substance thereof, except when lawfully authorized or directed so to do, shall be liable to the same penalty and imprisonment as are enacted in section 23."

The penalty for violating this act—which appears to be a civil statute—is "one hundred ($100.00) dollars recoverable by suit in a court of competent jurisdiction by any person suing therefor in his own name" (Section 23). Upon default in paying such a penalty, the violator is subject to imprisonment for up to three months (A. 116-117).

Appellants' claim that wiretapping by the Quebec law enforcement officials here violated Section 24 is without substance. Their own expert, Serge Menard, testified that mere wiretapping without disclosure would not violate Section 24 (A. 954). Moreover, he also stated that testimony given in a court, which discloses the contents of a seized conversation, is "lawfully authorized" within the meaning of Section 24 (A. 951):

> "The Court: But then the crime isn't committed until divulgence: right?
>
> The Witness: Exactly.
>
> The Court: Then if it comes to divulgence to an American Court it cannot be a Canadian crime?
>
> The Witness: I don't understand.
>
> The Court: If the divulgence of the substance of the conversation is the crime, is it a crime when the divulgence come when it is shown in court.
>
> The Witness: That is one way to divulge, but that way you are authorized to do it by law.
>
> * * * * *
>
> The Witness: The crime is to do both, the crime is to listen and to divulge.
>
> The Court: Either or both in combination?
>
> The Witness: It is both.
>
> The Court: The combination?
>
> The Witness: Exactly."

This consideration aside, the Quebec courts have construed Section 24 as not barring wiretapping undertaken by law enforcement officers in furtherance of legitimate investigations. *Regina* v. *Lesarge*, *supra*, A. 257, 266; *Dasti* v. *Patenaude*, *supra*, *affirmed*, A. 2856, 2888.

The latter case, as we have previously noted, involved the very wiretapping here at issue. The courts of Ontario have similarly construed a comparable statutory provision. See, *Regina* v. *Demeter*, 19 C.C.C. 2d 321 (1975) (A. 2801); *In Re Copeland and Adamson*, 7 C.C.C. 2d 393 (1972), A. 229.

The authority relied upon by the appellant is clearly inapposite here. The Ontario Court of Appeals decision in *Regina* v. *Chapman and Grange*, 1973 (A. 83-100), did not involve a legitimate investigation by law enforcement officers; nor was disclosure made in the form of testimony in a judicial proceeding. Instead, two law enforcement officers moonlighting as private detectives conspired to wiretap and disclose the contents of the seized conversations to their private employer (A. 91-94). This is not this case.

Similarly, the construction placed upon former Section 605 of the Federal Communications Act by our Supreme Court is of little or no relevance here. Contrary to appellants' claim, Section 24 of the Telephone Companies Act of Quebec is not "practically verbatim with the provisions of our former Section 605" (Br. 33). Unlike former Section 605, which contained a flat prohibition against any disclosure wiretapped conversations, Section 24, as we have shown, and as appellants' own "expert" witness testified, permits disclosure of such conversations by a law enforcement officer "when lawfully authorized or directed to do so." Thus, while *Lee* v. *Florida*, 392 U.S. 378 (1968), upon which appellants rely, reiterated the holding of *Nardone* v. *United States*, 302 U.S. 378, 383 (1937), that recitation in court of the contents of an illegally intercepted conversation constituted a violation of former Section 605, that is not true with respect to Section 24 of the Telephone Companies Act of Quebec.

In sum, it is plain, that the district court properly concluded that Canadian law was not violated by the Canadian law enforcement officers in the instant case.

F. Appellants do not have standing to contest the admissibility of all of the seized conversations; and the admission of the eight conversations as to which appellant Cotroni does have standing was harmless error.

Appellants' brief has ignored altogether the critical issue of standing. Section 2518(10) provides that only an "aggrieved" person has standing to object to the admission of illegally obtained evidence. Under this standard, which codifies the traditional test for determining standing (*Alderman* v. *United States*, 394 U.S. 165, 175-176, n. 9 (1969)), each appellant "would be entitled to the suppression of government evidence originating in electronic surveillance violative of *his* own * * * right[s] * * *. Such a violation would occur if the United States unlawfully overheard conversations of a[n appellant] himself or conversations occurring on his premises, whether or not he was present or participated in those conversations". *Alderman* v. *United States*, *supra*, 394 U.S. at 176; see, also, *United States* v. *Bynum*, 513 F.2d 533, 535 (C.A. 2, 1975). Moreover, the standing requirement is also incorporated in the Protection of Privacy Act of Canada, § 178.16 (App. 126) which provides that an illegally intercepted conversation is inadmissible only against a party to the conversation.

Here, as the table contained in the appendix to appellants' brief show, only two of the twelve wiretaps were on telephones located in premises owned by appellant Cotroni (Appellants' Br. [Appendix] p. 1a) and only thirteen of the thirty-two conversations which were admitted in evidence involved calls over those telephones or to which appellant Cotroni was a party; five of those thirteen calls (Call Nos. 4, 18, 20, 21 and 22) involved calls solely within Canada (Appellants' Br. [Appendix] pp. 2a-3a), and, therefore, would not under any circumstances violate Title III. Accordingly, assuming that Title III was violated, appellant

Cotroni would have standing to object to the admission of only eight of the thirty-two conversations (Call Nos. 10, 12, 16, 17, 19, 27, 29 and 31; Appellants' Br. [Appendix] p. 2a).[30] We submit that the admission of the conversations to which Cotroni has standing to object is harmless error, if error at all. There is no dispute, and appellants concede, that "Catania's testimony, if believed by the jury beyond a reasonable doubt, would have required a guilty verdict" (App. Br. p. 6). There is also no dispute that, given "Catania's background and his admitted motivation to avoid a heavy prison sentence" (App. Br. p. 6) it was important to substantially corroborate Catania's testimony in order to convince the jury to credit it. We submit that, even without the conversations to which appellant Cotroni has standing to object, the independent evidence corroborating Catania's testimony, including the other twenty-four telephone conversations, the physical surveillance and other undisputed facts, were such that the eight conversations to which he was a party (while highly incriminating) were merely cumulative and constituted harmless error (see *Milton* v. *Wainwright*, 407 U.S. 371 (1972).[31]

We proceed to a brief recapulation of that evidence here.

1. Catania testified about his close relationship with Frank Cotroni and their meeting in Mexico City towards the end of December 1970 (Tr. 60) when the conspiracy was

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[30] Assuming a violation of Canadian law, and that the Protection of Privacy Act of Canada applied retroactively, appellant would have standing to object to the admission of twelve conversations, *i.e.*, the five intra-Canada calls, plus seven of the eight calls coming into or out of Canada. One of the eight (Call No. 19) involved a call from Dasti to Cotroni's maid and he would not have standing to object to it under Canadian law.

[31] We cannot make a similar argument with respect to the appellant Dasti who was a party to over two thirds of the conversations which were admitted into evidence.

formulated. Catania further testified that when he approached Cotroni about the cocaine Cotroni stated that he would have to contact a friend, Frank Dasti (Tr. 60-61, 69). Corroboration for this testimony was provided by the visual surveillance of Cotroni's arrival at the Mexico City airport on the 19th of December, 1970, where he was picked up by a car registered to Catania (A. 1668-1669) and by the subsequent telephone calls between Oddo and Dasti concerning the details of a proposed cocaine transaction (A. 1756-1766; Government Exhibit 39, Conversation No. 1-3); Cotroni's visit to Montreal on December 31, 1970 (A. 1689-1691); and a telephone conversation between Dasti and Cotroni (in Canada) on January 1, 1971, in which Dasti indicated that his customer was ready to make a purchase (A. 1772; Government Exhibit 39, Conversation No. 4).

2. Catania also testified that, in his later meeting with Cotroni, it was arranged that prior to delivery of the cocaine in New York, Catania, Dasti and Cotroni would meet in Montreal (and that such a meeting did take place) and that a total of nine kilograms of cocaine would be delivered (Tr. 60-61, 67-70). Corroboration for their testimony was provided by the visual surveillance of a meeting between Dasti, Cotroni and Catania in Montreal prior to delivery (A. 1888-1889) and the testimony of George Stewart that a total of nine kilograms of cocaine were delivered to the Bynum ring (A. 2251-2263). More significantly, after this meeting, a call was overheard between Frank Dasti and his wife in which she was told to pack her bags for New York because "I gotta meet some people on Sunday, you know?" And that the trip was being paid for by "Frankie" (Frank Cotroni) (A. 1904-1909; Government Exhibit 39, Conversation No. 9). Similarly, after Dasti arrived in New York, and apparently noticed the tight surveillance he was under, he called an associate of his, one Horvath, and asked him to tell Frank Cotroni that "it was very dangerous what they have to do", but Dasti would "do what he has to do" (A. 2002-2003).

3. Catania testified that in New York on January 10, 1971, Dasti directed him to deliver the cocaine to Paul Oddo in Room 718 of the Riverside Plaza Hotel (75-81). This testimony was corroborated by the slip of paper with the words "Room 718" and "Sommer" found in Dasti's pocket on the day of his arrest; hotel documents establishing that Room 718 had been rented during the period of the delivery to a "Hedy and Marion Summer"; and the testimony of the hotel manager that Paul Oddo had been posing as a Mr. Summer (A. 2369-2376; Government Exhibit 45, A. 2202-2205).

4. Catania testified that on January 11, 1971, he asked that Cotroni, whom he knew would be traveling to Mexico, bring him the rest of the payments owed on the cocaine(and that Cotroni did make a partial delivery) (88-89). The United States introduced airline records into evidence to establish that Cotroni had flown to Mexico from Montreal on January 14, 1971 (A. 2423).

5. Catania testified that approximately one week later, at the same time that a Guido Orsini arrived in Mexico, Cotroni delivered an additional $7,000 to Catania (95-96). The surveillance of January 22, established that, after entering the Bank of Nova Scotia, Dasti had given Orsini a parcel and that Orsini stated that he would be leaving for Mexico that evening (A. 2067-2076, 2093-2098).

6. Finally, Catania testified that after the delivery of this payment, Cotroni inquired as to the availability of heroin. The testimony of George Stewart (A. 2249-2250) and intercepted telephone conversations in which the "other thing" was mentioned provided corroboration of Catania's testimony by establishing that the main interest of the conspirators in the cocaine was their hope that shipments of heroin would soon follow (A. 1781-1970; Government Exhibit 39, Conversation Nos. 5, 7).

In sum, this highly probative and independent corroboration of Catania's testimony implicating Cotroni renders harmless the admision of telephone calls to which Cotroni was a party and to which he has standing to object.[32] While we recognize that the conversations overheard on these calls were highly incriminating, their overall effect, as was the case with confession that was erroneously admitted in *Milton* v. *Wainwright, supra,* was merely cumulative.[33]

POINT II

The conversations were properly admitted although the Canadian law enforcement officials exercised discretion in determining which conversations would be preserved and refused to provide transcripts or logs of conversations which did not take place during the period of the conspiracy for which appellants were tried.

Appellants have linked together three separate arguments in Point II of their brief. First, they claim that the United States waited "until practically the eve of trial (November 1, 1974) before permitting the defense any access to the electronic surveillance" and that when such disclosure was made "the government literally bombarded the defense with thousand of pages of documents" (Br. 38-39). Second, although they claim to have been "bombarded" with too much material of this kind, they claim that they were not provided with sufficient tapes because (1) the Canadian law enforcement officers refused to make

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[32] Other easpects of Catania's testimony were similarly corroborated (see, *e.g., supra,* pp. 13-14).

[33] In *Milton* v. *Wainwright, supra,* the confession which was erroneously admitted, although one of several made by the defendant, was the only one which was not obtained under circumstances which cast doubt upon its truthfulness and was relied upon heavily by the prosecutor in his summation (407 U.S. 371, 383-384, dissenting opinion).

available preserved conversations and logs which involved conversations which took place before and after the period in which the illegal activity here at issue occurred; and (2) they did not preserve all the conversations which were intercepted. These claims are without merit.

1. Appellants' claim, regarding the alleged delay in turning over the wiretap materials, is not supported by the record. The materials were turned over to the appellants not on "on the eve of trial"; disclosure of these materials began on November 1, 1974, over two months before the trial (which began on January 6, 1975), and a day after appellant Cotroni was arraigned on the indictment (after waging an unsuccessful battle to avoid extradition). On that date a copy of the tape containing the conversations which the United States intended to use was turned over to appellants. By November 14, 1974, copies of the transcripts of those conversations which the United States intended to offer (with English translations), were made available (220-221).[34] Moreover, if the materials were voluminous, it was because appellants wanted all conversations, whether relevant or not, and they received whatever transcripts or logs that were made by the Canadian law enforcement officials from December 1, 1970 to January 31, 1971. These materials covered the period in which practically all of the events described earlier took place. Absent any showing as to why a period of approximately two months was insufficient time for appellants to review these materials, or any showing of prejudice, this claim is frivolous.

2. Appellants' next argument is equally without merit. We have already shown that all available materials, recorded converstions or logs for the period during which the

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[34] These transcripts and logs were prepared for us by the Canadian law enforcement officers, and were turned over to the appellants as soon as they were received. (The indictment was not based upon any of the information obtained from the wiretaps).

conspiracy was carried out (December 1970 through January 31, 1971), were made available to appellants or were presented to the district court for *in camera inspection* (A. 1043, 1339, 1577). Appellants claim, however, that they were also entitled to discovery of thousands of other conversations which were made over the three year period of time (1970-1973), during which the wiretapping took place (A. 439-446), even though none of these materials was admitted into evidence and none were made during the period of time during which the conspiracy was carried out. At the very least, they argue, Chief Judge Mishler should have accepted the condition imposed by the Canadian authorities and travelled to Canada to review these materials *in camera*. We believe that Chief Judge Mishler quite properly refused to waste his time or delay the trial to engage in such an effort.

Appellants who were parties to these conversations did not make the slightest showing of how these conversations —outside the time period of the alleged offense—could possibly have been relevant. Indeed neither of appellants took the witness stand at the hearing before trial or at the trial. Moreover, even if these additional conversations were actually in the possession of the United States, instead of a foreign government, appellants would have had no absolute right to such discovery. Although Rule 16(a) provides that the district court "may" order disclosure to a defendant of prior statements, such disclosure is subject to Rule 16(e) which provides that "[u]pon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred." Here, the discovery sought by appellants, whether to themselves or to district court in camera, would have required the review of tapes, transcripts and logs over a three year period of time. It would have posed an enormous burden on Chief Judge Mishler and would have substantially delayed the trial. Indeed, if appellants claim that two months was not enough time to review two months of logs and transcripts, what

would have been an adequate time to review similar material collected over a three year period?

While these considerations alone would provide compelling support for the issuance of a protective order, if Rule 16 were applicable here, the justification for such an order becomes all the more apparent here since the conversations at issue did not take place during the period when the conspiracy was carried out nor were any of them used at the trial. As Judge Mansfield observed in *United States* v. *Louis Carreau, Inc.*, 42 F.R.D. 408, 413 (S.D.N.Y. 1967):

> "If the defendant's prior statement is not to be introduced by the Government at trial, it is difficult to see how the failure to furnish the defendant with a copy of the statement at an earlier point would deny him a fair trial."

Although, as Judge Mansfield continued in *United States* v. *Louis Carreau, Inc., supra*, a defendant could possibly claim that he was deterred from taking the witness stand because he feared cross-examination, here no such claim was ever asserted in the district court, despite repeated requests from Chief Judge Mishler for some showing that would justify his examination of the additional wiretap transcripts or the many hours of listening to untranscribed tapes.

Accordingly, we submit that it was not an abuse of discretion in these circumstances for Chief Judge Mishler to waste valuable time reviewing irrelevant materials. Indeed, in these circumstances, under the broadest construction of Rule 16, he would have been justified in issuing a protective order limiting discovery under Rule 16(e).[35]

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[35] The provisions of Rule 16(e) aside, the issue whether, and to what extent, Rule 16(a) by itself, afforded discretion to deny a

[Footnote continued on following page]

3. The final argument raised by appellant turns on the fact that the Canadian law enforcement officials who, as appellants acknowledge, "admittedly never used the tapes in court before and were conducting the wiretaps herein, not for evidence but for information and investigation purposes" (Br. 39), exercised some discretion in determining which conversations would be preserved on tape, which conversations would simply be summarized in writing, and which conservations would not be preserved or memorialized. This argument, we submit, is also without merit.

The reasons why the Canadian law enforcement officials did not preserve all the conversations, which were seized over the three-year period during which the wiretapping took place, were essentially practical. The wiretapping was being undertaken for intelligence purposes only, and there was simply no point in keeping thousands of reels of conversations which were of no value. Moreover, Chief Judge Mishler expressly found that the procedures were followed in good faith (A. 1343). As the Canadian law enforcement official in charge of the operation, Mr. Barnard Couture, explained in response to questions put by defense counsel (A. 1306-1307):

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request for discovery absent some showing of relevance was left open in *United States* v. *Crisona*, 416 F.2d 107, 115 (C.A. 2), *cert. denied*, 397 U.S. 861 (1969). Although the proposed amendment to Rule 16(a) which takes effect August 1, 1975, makes such disclosure mandatory (subject to the power of the district court to enter a protective order), there was substantial support for the view that, absent some showing of relevance, Rule 16(a) did not mandate disclosure of a defendant's statements. See *United States* v. *Dioguardi*, 332 F. Supp. 7, 17 (S.D.N.Y. 1971); *United States* v. *Leighton*, 265 F. Supp. 27 (S.D.N.Y. 1967); *United States* v. *Kaminsky*, 275 F. Supp. 365 (S.D.N.Y. 1967); *United States* v. *Wallace*, 272 F. Supp. 838 (S.D.N.Y. 1967); *United States* v. *Wood*, 270 F. Supp. 963 (S.D.N.Y. 1967); *United States* v. *Longarzo*, 43 F.R.D. 395 (S.D.N.Y. 1967); *Loux* v. *United States*, 389 F.2d 911 (C.A. 9, 1968). Contra *United States* v. *Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968), and cases cited.

Q. How many phone calls altogether were there during the month of December and January—altogether on all the Projects, if you know?

A. A thousand, a thousand, a thousand, sir.

Q. And of these thousands, only fifteen percent or twenty percent have been preserved?

A. Yes, sir.

Q. For the same reason, that you never thought that you'd have to use them as evidence in court?

A. That I thought it was useless for us to keep.

Q. At the time?

A. Yes, sir.

Q. At the time you are talking about, you didn't know there was a Mr. Catania somewhere in the world—in 1970?

A. Yes, I knew there was a certain Mr. Catania.

Q. Only because of the conversations on the tapes?

A. Yes, sir.

Q. You did not know he was a cooperative witness on behalf of the Government?

Mr. Puccio: He wasn't.

Q. In other words, at the time that you made all of these decisions, you did not know that some time three or four years later Mr. Catania might be a witness in a case?

A. No, sir.

Accordingly, Mr. Couture adopted the following procedure. After removing the tapes from the machine he would listen to them in their entirety (A. 1815). He would then determine the pertinency of the particular conversation (A. 1711). In determining whether, and how these conversations were to be preserved, he divided the conversation into three categories.

First, were conversations which were "very important." When he determined that a call fell within this category,

he took a brand new tape and re-recorded the conversation on that tape—"the master tape." As he explained (A. 1716):

> I mean by that, let's say, if I have the original tape and there is 20 calls in it and there is only one which I judge very important—I didn't keep them because we would have kept millions of them—so I kept only—I transferred the conversation that was on the original tape to another tape.

(Of the thirty-two conversations that were admitted into evidence, seventeen were on "master tapes" which Mr. Couture personally made and authenticated.)

Second, were the conversations of some importance, but which were of the kind that could be reduced to writing in the form of a summary ('logs"). As Mr. Couture explained (A. 1712-1713):

> A. * * * The second category could be of some importance; an example, Mr. Dasti called in to Mr. Cotroni and he says, I am going to meet you at such a time at such a place. This would be logged in but we wouldn't do a master tape of it.
>
> Q. * * * [Y]ou would write in a summary of certain conversations?
>
> A. Yes, sir.
>
> Q. So you would type up a little report of the incident of that conversation, what you thought there was that was important of that conversation?
>
> A. Yes, sir, a summary of that conversation.

(Of the thirty-two conversations, Mr. Couture, using the logs to refresh his recollection, testified to the substance of fifteen conversations).

Third, were conversations which were deemed to be of no importance and which were not preserved or memorialized (A. 1712):

Q. In other words, a log wasn't made if someone was ordering Chinese food, you didn't even bother indicating that on your summary that a call was made?

A. Yes, sir, because we had so much projects it wasn't possible for us to type up all the information; this was useless information.

The entire procedure described above was disclosed to the jury and, of course, they were free to evaluate the credibility of Mr. Couture's testimony, under oath, in light of the procedures he followed. Accordingly there is no legal impediment to the admissibility of his testimony regarding the conversations he overheard or the tapes he made. But appellants argue (Br. 40):

> "If the non-disclosure of material evidence requires that a convicted defendant be granted a new trial, then must it not follow, *a fortiori*, that the destruction of such evidence should bar a conviction based upon that which was not destroyed, or upon self-serving summaries. *Cf. Brady* v. *Maryland*, 373 U.S. 83 (1963) and *United States* v. *Polisi*, 416 F.2d 572 (2d Cir., 1969); and *People* v. *Betts*, 272 App. Div. 737, 74 N.Y.S. 2d 791 (1st Dept., 1947)."

Appellants, however are wrong in suggesting that the "non-disclosure of material evidence requires that a convicted defendant be granted a new trial"; the rule is that non-disclosure of *exculpatory* evidence requires a new trial. Here there is not the slightest basis for assuming that any "evidence" (as distinguished from irrelevant conversations) was destroyed, much less that any exculpatory evidence was destroyed; and appellants who were parties to the conversation did not submit so much as an affidavit alleging that any such conversations ever took place. Under these circumstances, there is no basis for holding that the failure to preserve all the conversations required the suppression

of those that were preserved. See, *United States* v. *Sewar*, 468 F.2d 236 (C.A. 9, 1972), *cert. denied*, 410 U.S. 916 (1973); *United States* v. *Augello*, 451 F.2d 1167, 1170 (C.A. 2, 1971).[36] Indeed, the exercise of discretion by law enforcement officers in determining which conversations will be recorded and preserved is not extraordinary. Had a warrant been obtained here, pursuant to Title III, it would have authorized seizure of only certain relevant conversations dealing with the offense for which there was probably cause to believe was being furthered by telephone conversations [18 U.S.C. 2518(3) and 2518 (4)]; moreover, the law enforcement officers would likewise have been required to take steps to minimize this invasion of privacy by not recording irrelevant conversations [18 U.S.C. 2518(5)]. Quite plainly, this exercise of discretion by law enforcement officers, which is mandated by the Fourth Amendment and Title III, can hardly be said—absent a showing of bad faith—to deprive the defendant of a fair trial. See, *United States* v. *Augenblick*, 393 U.S. 348 (1969). Of course, as we have previously noted, Chief Judge Mishler found that the Canadian law enforcement officers here were acting in good faith (A. 1343).

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[36] In *United States* v. *Sewar*, *supra*, a technician who inadvertently destroyed defendant's blood sample was allowed to testify that the sample showed that defendant was intoxicated. The Court of Appeals held that "the fact that the sample is missing may make cross-examination more difficult, but that does not amount to a denial of confrontation" (468 F.2d at 238). Similarly, in *United States* v. *Augello*, *supra*, law enforcement officers who heard conversations, the tapes of which were later destroyed, were allowed to testify to the substance of these conversations.

POINT III

The introduction of the evidence relating to the involvement of the Bynum narcotics ring and the proof of the future intent to traffic in heroin did not unfairly surprise or prejudice the defendants.

Appellants appear to make two distinct arguments in Point III of their brief. First, they argue that they were allegedly prejudiced because the bill of particulars, which contained the names of the conspirators at the Bynum end of the chain sale, was not filed until the first day of the trial. Second, the appellants contend that the admission of evidence regarding the participation of the Bynum ring in the conspiracy constituted an abuse of discretion on the part of the trial judge. These claims are without substance.

I. In late November 1974, the Assistant United States Attorney handling the case first became aware of the Bynum link in the conspiracy.[37] Subsequently, on December 11, 1974, motions were filed by the appellants (including a motion for a bill of particulars); the motions were argued on January 2, 1974 (A. 4, 1404-1405) On January 6, 1975, more than a week before the prosecution began pre-

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[37] The appellants claim erroneously that "the government knew long in advance of this trial of the alleged connection between the instant conspiracy and the activity of the Bynum group" (Br. 43). The prosecution did not establish with certainty the connection with the Bynum group, which was testified to by George Stewart, until the third week in November 1974 (A. 2226). The Bynum link was discovered fortuitously when a law enforcement officer who had participated in the Bynum investigation happened to be present when the Assistant United States Attorney was listening to the Cotroni-Dasti tapes. The remarks made in some of the taped telephone conversations about the damaged cocaine (an aspect of the Bynum case) led the law enforcement officer to suggest that there was a connection between the cocaine purchased by Cotroni and Dasti and the Bynum ring. It was at this point that the prosecution began developing the Bynum aspect of its case against the appellants.

senting the aspects of its case that involved these individuals the defense was provided with the names of the unindicted co-conspirators including George Stewart (who was not technically a co-conspirator), Elvin Lee Bynum and Joseph Cordovano. On January 7, 1975, the appellants objected to what they claimed was an unnecessary delay in providing the bill of particulars. At this point Chief Judge Mishler made the first of many offers to provide appellants with whatever time they felt was needed to investigate the additional conspirators (Tr. 119-120).

> The Court: How are you prejudiced?
>
> Mr. Iannuzzi: By not knowing who these individuals were so we could go out and investigate and find out whether or not these people participated with the defendants and knew the defendants etc.
>
> The Court: All right, Mr. Iannuzzi, we will suspend on Friday, probably about 4:30. . . You can check any of these people from Friday afternoon to Monday morning, the 13th, and then you will have the next weekend and then if you need more time to locate these people to try to prove that they were not members of the conspiracy——
>
> Mr. Iannuzzi: Possibly that, your Honor.
>
> The Court: If you think that can help you, you tell me how much time you need and you will get it.

At no point during the next week of the trial did the appellants request addiitonal time to investigate the Bynum aspects of the case.

On January 14, the United States began its presentation of the Bynum aspects of the cocaine conspiracy with the direct examination of George Stewart. Appellants claimed they were still unprepared for this testimony. Chief Judge Mishler asked them how much time they wanted and offered to "delay as long as necessary to get all the witnesses" requested by appellants (A. 2224). Both times

the appellants changed the subject.[38] Moreover, although Chief Judge Mishler specifically offered to adjourn the case for six days until the following Monday, January 20, so that the defense could interview the co-conspirators (A. 2233, 2240), this offer, like all the others, was apparently never acted upon by the appellants.

Accordingly, it is plain that appellants were not prejudiced by the alleged delay in serving the bill of particulars. *See, United States* v. *Salazar*, 485 F.2d 1272, 1277-78 (C.A. 2, 1973), *cert. denied*, 415 U.S. 985 (1974). Indeed, even now, some six months after the trial, they are unable to show what more they could have come forward with had the bill of particulars been served six months before trial. And, of course, they would not be without a remedy if they do come forward with any significant newly discovered evidence (F.R. Crim P., Rule 33).

2. Appellants' argument, that they were unfairly prejudiced by the admission of the evidence of the Bynum link in the conspiracy, is without merit. This evidence, introduced through the testimony of George Stewart, was admitted to show the complete picture of the overall conspiracy to import cocaine and the motive of appellants and the others to obtain a new source for heroin. Such evi-

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[38] In addition, the day before George Stewart testified, the appellants had been provided with his Jencks Act material, but appellants' lawyers had not even bothered to read this material had, in fact, been available to the defendants even earlier. As appellants counsel admitted [A. 2225].

> Mr. Iannuzzi: (Attorney for Cotroni) Let me suggest this, so everything should be spread on the record, with reference to the three volumes [of 3500 material], I didn't have to carry them to my office, Harry Boytel (sic) [attorney for Alvim Lee Bynum] is an associate in the office two floors above mine. I can get all the information I want with thousands of pages to read.

dence was plainly admissible for this limited purpose, see *United States* v. *Carella*, 411 F.2d 729, 731 (C.A. 2), *cert. denied*, 307 U.S. 860 (1969); *United States* v. *Deaton*, 381 F.2d 114, 117 (C.A. 2, 1967), and Chief Judge Mishler specifically instructed the jury that they were only to consdier the testimony relating to heroin "on the issue as to whether the accused entered into the conspiracy for the cocaine as charged in the indictment knowingly and wilfully" (A. 2694).[39]

Moreover, it is submitted that the evidence of appellants participation in the conspiracy to import cocaine into the United States was so overwhelming, with or without the

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[39] Appellants also suggest "that many of Stewart's facts [regarding the Bynum link] do not fit the circumstances of this case" (Br. 42). The "many" facts are really only two in number and are explainable. While Stewart did testify that on January 8, 1971, Cordovano told him that the shipment would consist of 24 kilos cocaine, when only nine kilos ultimately were imported, that erroneous assumption apparently derived from Dasti's remark to Paul Oddo on December 31, 1970, very likely before Dasti knew the amount of cocaine involved, that "I can get dozens of K suits", *i.e.* kilograms of cocaine (see, *supra*, 7-8). The fact that ultimately only nine kilograms arrived does not show that the cocaine delivered to Bynum was not the same cocaine which appellants conspired to import into the United States. Similarly, the fact that the minute sample (2.26 grams) of the cocaine Stewart retrieved from the five brown spotted kilograms of cocaine delivered to Bynum was pure white is explained by the testimony of the chemist that it is not uncommon for the same quantity of cocaine to have a varied coloration and texture. A. 2361-2364). Moreover, the case-in-chief outlined in the earlier part of this brief, based on direct testimony, visual surveillances and the wiretapped conversations, clearly established that the appellants were linked to the Bynum organization in the cocaine deal.

Bynum link in the chain, that any error in the admission of this evidence was plainly harmless.[40]

POINT IV

The admission of intercepted conversations between Dasti and his wife did not violate the marital privilege and, in any event, was harmless error.

1. Appellant Dasti argues that, because there was no evidence of "dual participation" in crime, the intercepted communications between himself and his wife were privileged and therefore inadmissible at trial. In making this argument, the appellants have ignored the traditional justification for the marital privilege:

> The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well.

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[40] *United States* v. *Sperling*, 506 F.2d 1323, 1340-41 (C.A. 2d 1974), as the excerpt quoted by appellants shows, is totally inapplicable here. The main objection voiced to the indictment format used in that case concerned the difficulties created at the trial and appellate level in multi-defendant chain conspiracy cases. No matter how desirable a multi-defendant trial might be from the prosecution's viewpoint, the *Sperling* panel warned that this did not justify a single conspiracy charge when there were two separate criminal conspiracies, possibly only linked at the top. In the present case there were only two defendants—the administrative and evidentiary problems contemplated by the *Sperling* court were not present. Rather, this was the usual chain conspiracy encountered in drug cases and properly the subject of a single criminal proceeding. See, *United States* v. *Bynum*, *supra* at 496.

Hawkins v. *United States*, 358 U.S. 74, 77 (1958). *See* 8 Wigmore §§ 2228, 2241 (McNaughton Rev. 1961); Advisory Committee Notes, Rule 505, *Proposed Federal Rules of Evidence*, 51 F.R.D. 315, 369-71 (1971).

These considerations bear no relevancy to the admission of intercepted wire communications under circumstances where neither spouse is compelled to provide testimony or evidence against the other spouse or in any way to violate the confidence of a marital relationship. Accordingly when a marital communication has come into the hands of the prosecution through a third party (albeit a foreign government) and not by the testimony or through the assistance of one of the spouses, then there is no justification for regarding that communication as privileged. *United States* v. *Burks*, 470 F.2d 432, 436-37 (D.C., C.A. 1972); *United States* v. *Dickerson*, 65 F.2d 824, 827 (C.A., D.C.); McCormick, *Evidence* § 82 (2nd Ed. 1972), *cert. denied*, 290 U.S. 665 (1933). Moreover, the cases cited by the appellant Dasti do not support the proposition that "[i]n the absence of dual participation in crime, the confidences imparted by a husband to his wife are absolutely privileged and may not be used in evidence against him" (Br. 45). Indeed, in *Wolfle* v. *United States*, 291 U.S. 7 (1934), cited by appellant it was held that the husband's voluntary disclosure to a stenographer of a confidential marital communication rendered that communication admissible through the testimony of the stenographer.

Although there is authority for a related principle which bars any disclosure of confidential communications between spouses—that is of communications "which would not have been made but for the absolute confidence in * * * the marital relationship" (*People v. Melski*, 10 N.Y. 2d 78, 80 [1961]; see, also *United States* v. *Fisher*, — F.2d —, June 25, 1975 [C.A. 2] Slip Op. 4523, n. 2.), that privilege does not apply to "all the daily and ordinary communications between the spouses." *People* v. *Melski, supra; Richardson, Evidence*,

(10th Ed., Prince, § 448). Here, as appellants acknowledge (Br. 45), the conversations between Mr. and Mrs. Dasti, while incriminatory in the context of the other evidence, are by themselves purely innocuous and fall within the category of "daily and ordinary communications". Indeed, appellants concede that "[a]n examination of those telephone conversations gives no indication that Mrs. Dasti participated in or was aware of any illegal activity in which her husband may have been engaged" (Br. 45).[41]

Moreover, this aspect of the marital privilege has been criticized (see, Weinstein and Berger, *Evidence* § 502 (02) (1975); Advisory Committee Notes, Rule 505, *supra*); and, if necessary we would ask that it be rejected totally. Cf. *United States* v. *Fisher*, *supra*, Slip Op. at 4526. In any event, assuming *arguendo* that these four intercepted conversations were privileged and should not have been admitted, in the context of the overwhelming evidence against Dasti, their admission was merely cumulative and constituted harmless error.

Dasti was a party to a total of 24 intercepted conversations admitted into evidence; of these, only four involved communications with his wife. The conevrsation between Dasti and his wife on January 8, 1971, A. 1904; Government Exhibit 39, Conversation No. 9) that related to

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[41] There were in all four such conversations. In the first, Dasti tells his wife to pack her bags for a rtip to New York (A. 1904-1907); in the second he tells her he is waiting "for these two jerks" (Altamura and another individual) to arrive (A. 2015, Government Exh. 39, Conversation 11); in the third he tells Mrs. Dasti that "the Americans" (Altamura and another individual) will arrive shortly and he will meet them at the airport (A. 2017) and in the fourth he tells her that "the American" (Oddo) will be bringing him some money on a Sunday morning (A. 2051).

While we would be inclined to dispute appellant's assessment of Mrs. Dasti's awareness of her husband's activities, if we had to, we are prepared to accept that assessment here.

Dasti's forthcoming trip to New York City (where he would participate in the delivery of the cocaine to Paul Oddo) only added to the evidence of this same trip as detailed by Catania's testimony (Tr. 75), the hotel records of Dasti's stay in New York (A. 1911), and the visual surveillances conducted by narcotics agents (A. 1920-1922). Two of the four conversations related to the expected arrival of Altamura in Canada (A. 2015; Government Exhibit 39, Conversation No. 11) with payment for the cocaine. The same ground was covered in a conversation between Cotroni and Dasti prior to these allegedly inadmissible communicattions with Mrs. Dasti (A. 2016) as well as by the hotel records of Altamura's stay in Montreal (A. 2424). Finally, the prosecution introduced into evidence a telephone communication from Dasti to his wife that related to the arrival of Oddo in Canada, also bringing payment for the cocaine (A. 2051); the corroboration for this aspect of the conspiracy was available in conversations betwen Dasi and Oddo (A. 2026; Government Exhibit 39, Conversation No. 15) and Dasti and Cotroni (A. 2055; Government Exhibit 39, Conversation No. 17).

It is therefore, submitted that the admission of the four intercepted conversations between Frank Dasti and his wife did not violate the marital privilege and, regardless of the privilege, was harmless error.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

Dated: July 10, 1975

DAVID G. TRAGER,
United States Attorney,
*Eastern District of New York.**

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
Of Counsel.

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* We wish to acknowledge the assistance of Gregory J. Wallance, a third year law student at Brooklyn Law School, in the preparation of this brief.

Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 14th day of July, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Michael Klar, Esq.
1501 Franklin Ave.
Mineola, N.Y. 11501

John N. Iannuzzi, Esq.
233 Broadway
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Evelyn Cohen

Sworn to before me this
14th day of July, 1975

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501956
Qualified in Kings County
Commission Expires March 30, 1977

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ___ day of _____, 19___, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19___

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United States Attorney,
Attorney for _____

To:

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Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the ___ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
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_____, 19___

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United States Attorney,
Attorney for _____

To:

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Attorney for _____

_____ Action No. _____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ is hereby admitted.
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